

Recent Compliance Updates & Tips

[Stark Law Final Rule Summary](#)

By [Richard Kusserow](#) | November 2015

Recent Compliance Updates & Tips

CMS recently issued the Stark Law **Final Rule** (“Final Rule”), which makes numerous significant changes and provides important clarifications to the Stark Law. The Stark Law prohibits physician referrals of Medicare patients for certain “designated health services” to entities with which the physician has a financial relationship, unless an exception under the law applies. CMS has long struggled to address a backlog of Stark cases under the Physician Self-Referral Disclosure Protocol (SRDP). But in the Final Rule, CMS has (a) established two new exceptions to the Stark Law; (b) clarified certain regulatory terminology and requirements; and (c) responded to its request for comments about expanding access to necessary health care services. **CMS intends to loosen several previous strict interpretations of Stark Law exceptions** and has clarified the definition of “remuneration” to make more arrangements compliant. These revised guidelines will provide greater latitude to structure such arrangements.

Stark Law Final Rule Overview

The following outlines various key features of the Final Rule:

Writing Requirements. The Final Rule clarifies that a collection of documents, rather than a single document, can satisfy the writing requirement. Such collections could include governing board minutes and communications between the parties (including emails), invoices, canceled checks, and timesheets. However, the Final Rule still requires a signature on a contemporaneous writing to document the arrangement.

Term Requirement. CMS also clarified that when Stark Law exceptions require a term of at least one year, written agreements identifying a term of a year or more are not necessary. As long as the parties have contemporaneous writings demonstrating that an arrangement in fact lasted for at least a year, then they have met the one year term requirement.

Temporary Noncompliance with Signature Requirements. CMS amended the special rule for arrangements involving temporary noncompliance with signature requirements to give the parties up to 90 days to obtain all required signatures, regardless of whether the late signature is advertent or inadvertent.

“Takes into Account.” Many compensation exceptions to the Stark Law prohibit compensation that “takes into account” referrals. CMS specifically declined to define “takes into account,” and had provided examples of exceptions that use other wording but have a similar meaning. CMS has since amended the Physician Recruitment, Medical Staff Incidental Benefits, Obstetrical Malpractice, and Professional Courtesy exceptions to ensure consistent use of the phrase “takes into account.”

Publicly Traded Securities. CMS will exempt ownership or investment interests in securities listed for trading on an electronic stock market or over-the-counter quotation system from the Stark Law, provided that (a) quotations are published on a daily basis; and (b) trades are standardized and publicly transparent.

Medical Staff Incidental Benefits. CMS proposed to amend the Medical Staff Incidental Benefits Exception to replace the phrase “without regard to the volume or value of referrals” with “does not take into account the volume or value of referrals.” This proposal was finalized without modification.

“Stand in the Shoes.” Current Stark regulations provide that physician owners of a physician organization “stand in the shoes” of the organization and are deemed to have the same compensation arrangements, with the same parties and on the same terms, as the organization. The Final Rule provides that physicians in a group practice who are not owners and do not “stand in the shoes” of the group are not “parties” to a physician organization’s arrangements, for purposes of the signature requirement of the applicable exceptions.

New Exception for Recruitment of Non-Physician Practitioners (NPPs). CMS issued a new exception that permits remuneration from a hospital, federally qualified health clinic (FQHC), or rural health clinic (RHC) to a physician or medical group to assist in recruiting and employing a NPP in the geographic area served by the hospital, FQHC, or RHC. CMS also expanded the definition of NPP to include *clinical social workers, clinical psychologists, physician assistants, nurse practitioners, clinical nurse specialists, and certified nurse-midwives*. The exception is limited to NPPs who either become *bona fide* employees of the physician or group receiving remuneration from the hospital, or become independent contractors directly with the physician or group. CMS declined to expand the definition of NPP to CRNAs, dietitians, or physical therapists.

Geographic Area Served by Rural Health Centers and Federally Qualified Health Centers. *In the past*, CMS had expanded the physician recruitment exception to permit FQHCs and RHCs to make recruitment payments to physicians in the same manner as hospitals had been making such

payments since 1995. CMS determined that the method that defines “geographic area served by an FQHC or RHC” is the lowest number of contiguous or noncontiguous zip codes comprising 90 percent of patients, as determined on an encounter basis.

Retention Payments in Underserved Areas. The Retention Payments in Underserved Areas Exception permits certain payments to retain a physician in an underserved area. In Phase III, CMS modified the exception to permit hospitals, RHCs, and FQHCs to retain physicians if the physician certified in writing that he or she had a *bona fide* opportunity for future employment. CMS previously explained that a retention payment based on a physician’s certification may not exceed the lower of the following: (1) an amount equal to 25 percent of the physician’s current annual income (averaged over the previous 24 months); or (2) the reasonable costs the hospital would otherwise have to expend to recruit a new physician to the geographic area.

New Exception for Timeshare Arrangements. CMS acknowledged that timeshare leases are very common, particularly in rural areas. Due to the difficulty that timeshare leases experience in complying with the Rental of Office Space Exception due to the exclusivity requirement and prior guidance that the Fair Market Value (FMV) Exception does not apply to leases, CMS has provided a new exception for timeshare arrangements with the following modifications: 1) a timeshare arrangement must be between a physician and a hospital or physician organization; 2) equipment included under the timeshare arrangement must be in the same building as the office suite where E/M services are furnished; and 3) all locations under the timeshare arrangement, including the premises where E/M services are furnished and the premises where DHS are furnished, must be used on identical schedules. In the Final Rule, CMS also approved time-based rental fees.

Holdover Provisions. The exceptions for the rental of office space, rental of equipment, and personal service arrangements allowed “holdover” arrangements after the written agreement expired. Now, CMS has agreed to indefinite holdovers without modification, provided that the holdover continues on the same terms and conditions as the original arrangement and it maintains certain safeguards. However, if leases are at FMV when the arrangement expires, but the rental amount falls below FMV during the holdover period, the lease arrangement would fail to satisfy the requirements of the exception.

Additional Guidance for Physician-Owned Hospitals. The Final Rule amends current disclosure requirements for physician-owned hospitals, clarifies the definition of “public advertising,” and changes existing regulations for determining the baseline *bona fide* investment level. Current regulations require physician-owned hospitals to disclose that the hospital is owned or

invested in by physicians on all of the hospital's public websites and in all public advertisements. CMS revised those regulations to specify that a "public website for the hospital" does not include certain types of websites that may display limited information about the hospital but are generally unavailable to the public, such as social media websites, electronic patient payment or patient care portals, or electronic health information exchanges.

Stark Law Compliance: Suggestions for Compliance Officers

1. Review and update all policies related to physician arrangements to follow the new rules.
2. As part of ongoing monitoring and auditing, [review all physician arrangements](#) in light of the changes to the Stark rules to ensure compliance.
3. Be sure that management understands that additional opportunities for physician arrangements will exist under the new rules.