

Phase III of the Final Stark Law Regulations Released by Centers for Medicare & Medicaid Services (CMS)

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On August 27, 2007, the Centers for Medicare and Medicaid Services ("CMS") published Phase III of the Stark II regulations (the "Phase III Regulations"), which is the expected final rulemaking necessary to make the Stark II regulations final. The new Phase III Regulations include the full text of the final regulations and a preamble discussion of those final regulations by CMS.

The Stark law (section 1877 of the Social Security Act) prohibits a physician from making referrals for certain "designated health services" payable by Medicare to an entity in which the physician or the physician's immediate family member have a financial relationship unless an exception applies. The current version of the Stark law has been in effect since January 1, 1995, and applies to the referral of eleven "designated health services."

The statute establishes a number of specific exceptions and grants CMS the authority to create regulatory exceptions that pose no risk of fraud and abuse. Proposed regulations were originally published in January 1998. Phase I of the final rulemaking was published on January 4, 2001. Phase II of the final rulemaking was published on April 26, 2004.

The new Phase III Regulations released on August 27th, 2007, which are expected to be published in the Federal Register on September 5, 2007, primarily clarify aspects of Phase I and Phase II based on public comments. Similar to the prior Phase I and II rulemaking, the Phase III Regulations increase the flexibility of the Stark law's application to certain financial relationships with physicians by expanding the breadth of the regulatory exceptions. The Phase III Regulations cover all of the provisions in the Stark law except those related to advisory opinions and civil monetary penalties. Highlights of the Phase III rulemaking include:

- **Rural Hospital Recruitment.** Expands the geographic areas into which rural hospitals may recruit a physician (which may make it harder to meet the relocation tests).
- **Expanded Income Guarantee Rules for "Replacement Physicians."** With respect to a physician who is recruited to join another physician or practice in a rural area or HPSA to replace another physician who retired, died, or relocated within the previous 12-month period, permits the allocation of costs by the physician or practice to the recruited physician not to exceed either (A) the actual additional incremental costs attributable to the recruited physician, or (B) the lower of a per capita allocation or 20 percent of the practice's aggregate costs.
- **Restrictive Covenants Allowed in Joint Recruitment Arrangements.** The revised recruitment exception is altered to allow practice restrictions that do

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not unreasonably restrict the recruited physician from practicing in the geographic area served by the hospital.

- **Nonmonetary Compensation.** Expands the nonmonetary compensation exception to allow entities to avoid what would otherwise be noncompliance with the exception in certain circumstances, and to allow an entity with a formal medical staff to provide one local medical staff appreciation event per year.
- **Holdover Provision for Personal Service Contracts.** Adds a holdover provision in the exception for personal service arrangements on terms similar to those in the space and equipment lease contexts.
- **Clarifies Productivity Bonuses for "Incident to" Services.** Clarifies that productivity bonuses may be paid to certain physicians for services provided "incident to" the services personally performed by the physician.
- **Inadvertent Violations.** Provides relief for inadvertent violations of the Stark law prohibition under certain circumstances. For example, parties that inadvertently exceed the limit on non-monetary compensation may continue to meet an exception as long as the excess non-monetary compensation did not exceed 50 percent of the permitted amount and is repaid within 180 days of its receipt or the end of the calendar year, whichever is earlier.
- **Retention Payments to Physicians in Underserved Areas.** Adds a written certification option as an alternative to the requirement for a bona fide written offer under the exception for retention payments to physicians in underserved areas.
- **Elimination of FMV Safe Harbor.** Eliminates the proposed safe harbor within the fair market value definition for physician compensation (previously protected physician compensation as long as the compensation fell within certain physician compensation surveys).
- **Certain Financial Relationships to be "Collapsed."** The new definition of "direct compensation arrangement" considers a physician to "stand in the shoes" of a physician organization of which he or she is a member. This will require certain indirect financial arrangements to meet exceptions for direct financial relationships. CMS previously elected not to adopt this concept when it issued the Phase II regulations, but it now believes that such a rule is necessary. These new rules do not apply during the original term or current renewal term of arrangements that satisfied the exception for "indirect compensation arrangements" as of September 5, 2007.
- **Adds an alternative 45-minute transportation time test to the intra-family rural referrals exception.**

The Phase III Regulations will be effective 90 days after the publication date in the Federal Register which is expected to be September 5, 2007.

A copy of the complete Phase III Rulemaking can be downloaded at www.foulston.com under Related Links in the Health Care Practice Area.

For a detailed discussion of the new Phase III Regulations, please join us for the Foulston Siefkin 2007 Health Law Institute in Wichita, Kansas, on September 7, 2007. For a program brochure or to register, go to www.foulston.com/healthlawinstitute.

For Further Information

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