

Finally!: The Stark II Final Phase II Regulations.

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After over 15 years, the Stark Law is fully implemented for referrals for Medicare covered designated health services. It's been a long road: the Stark II statute, which added 10 new categories of designated health services, was enacted in 1995. Proposed regulations implementing Stark II were issued in 1998. Final Stark II regulations were issued in two phases. Phase I of the final regulations was issued in 2001 and became effective one year later. The Phase II Regulations, issued on March 26, 2004, became effective on July 26, 2004.

Generally, the Stark Law prohibits a physician from referring a Medicare or Medicaid patient to an entity for 11 categories of "designated health services" ("DHS") if the physician – or an immediate family member – has a financial relationship with the entity unless the relationship falls within an exception. Financial relationships are generally classified as either ownership or investment interests or compensation arrangements and can be direct or indirect.

The Phase II Regulations are lengthy and complex. They correct, supplement and explain the Phase I Regulations and implement those parts of the Stark Law that were not covered in Phase I. They establish new exceptions for Medicare managed care plans, professional courtesy arrangements, certain inadvertent and temporary lapses in compliance with an existing exception, charitable contributions by physicians, selected physician retention payments and technologies or services provided to physicians to permit their participation in a community wide health information system. On balance, the Phase II Regulations provide increased flexibility for structuring financial arrangements between physicians and entities that furnish DHS.

A comprehensive analysis of the Phase II Regulations is outside the scope of this article. However, the following are selected aspects of the Phase II Regulations which might be of interest to local physicians.

No Grandfathering. Certain relationships previously thought to be compliant with Stark, specifically in the areas of shared ancillary services and physician recruiting, are not permitted under the Phase II Regulations. These relationships will not be grandfathered under the Phase II Regulations and so must be restructured or unwound.

Compensation of Group Practice Physicians. The Phase II Regulations make it clear that a physician in a group practice, regardless of status as owner, employee or

independent contractor, may receive a profit share or productivity bonus based directly on the DHS that he or she personally performs and services that are "incident to" his or her personally performed services.

Physician Recruitment into Existing Practices. The Phase II Regulations provide a narrow exception for recruitment arrangements into an existing medical practice. Payments may be made by a hospital to the medical practice – rather than directly to the recruited physician – under limited circumstances. Among other requirements, the practice may not impose practice restrictions (including a non-competition covenant) on the new physician. In the case of an income guarantee, the costs allocated by the practice to the recruited physician may not exceed his or her actual incremental costs. In other words, the practice may not allocate an equal share of practice overhead to the new physician. The prohibition against non-competition covenants and the limitation of practice costs that may be covered by an income guaranty will make recruitment arrangements much less attractive to all parties.

Office and Equipment Leases. The Phase II Regulations modified the space and equipment rental exceptions to make them more flexible and forgiving. For example, "without cause" terminations (provided the parties do not enter into another lease for the same space or equipment for the balance of the lease term) are now permitted as are month-to-month holdovers for up to six months, subleases and capital leases.

Independent Contractor Compensation. The Phase II Regulations now permit independent contractor physicians to receive percentage based compensation. The categories of revenues that may be credited under a percentage based formula will depend on the physician's practice setting – that is, whether the physician provides services to a group practice, an academic medical center or other practice setting.

Now that the implementation of the Stark Law is complete, we should assume stepped-up regulatory scrutiny and enforcement activities.

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