

Stark II, Phase III Regulations

On September 5, 2007, CMS issued the final rule establishing the Stark II, Phase III regulations, which contains many changes that are predicted to have a significant impact on existing, as well as future, healthcare provider relationships.¹ The changes with perhaps the most significant expected impact are those related to provider compensation arrangements. To comply with the Stark regulations, entities with certain financial arrangements must be classified as having an indirect compensation arrangement or fall within one of the Stark exceptions. If a valid indirect arrangement agreement was signed prior to September 5, 2007, CMS will allow this arrangement to continue until the term of the arrangement expires.

One requirement, as set out in the Phase I regulations, stipulated that there exist at least two financial relationships in between the physician and the designated health services (DHS) entity. The Phase III regulations change the definition of an indirect compensation arrangement so that physician members, employees and contractors of the *physician organization* are now deemed to have identical (i.e. direct) compensation arrangements as the physician organization itself. A hospital that has a contract for professional services with a physician group (considered

indirect under the Phase I regulations because there was a financial relationship between individual physicians and their group practice as well as a relationship between the group practice and the hospital) is considered to have a direct compensation arrangement. The effect of this change is that a physician organization will not be considered an intervening entity for purposes of establishing an indirect compensation arrangement, and to avoid Stark liability may need to be structured differently.³

It should be noted that this change only applies to physician organizations, while other arrangements, e.g., an arrangement between a DHS entity, a leasing company, and a physician are analyzed as an indirect compensation arrangement.⁴

¹ "Paying for Performance – Risk and Recommendations," By Elliott S. Fisher, M.D., M.P.H., Perspective, the New England Journal of Medicine, www.nejm.org, November 2, 2006.

¹ "Phase III Regulations Result in Dramatic Changes to Stark Law," J. Kelly Barnes, et al., BNA Health Law Reporter, Vol. 16, No. 40, October 11, 2007, p. 1220.

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