

Stark III

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On Sept. 5, 2007, the Centers for Medicare & Medicaid Services (CMS) released Stark III, the final phase of the Stark Law, which became effective Dec. 4, 2007. Key aspects are summarized below.

Group Practices. Phase III establishes that productivity bonuses paid to physicians in group practices may be based directly on “incident to” services, even if those “incident to” services are otherwise designated health services (DHS) referrals. Profit shares, however, may not relate directly to “incident to” services. Phase III modifies the definition of “physician in the group practice” to require an independent contractor physician to contract *directly* with the group practice. Contracts through a staffing company or the physician’s employer, and leased employee arrangements will *not* suffice.

Compensation Arrangements. Under Phase III, referring physicians may “stand in the shoes” of their group practice or other physician organization in arrangements with entities that provide DHS. The compensation arrangements of the group/physician organization now are attributed to the individual physician members, whose arrangements must be analyzed under one of the direct compensation exceptions to the Stark Law, rather than as an indirect compensation arrangement. For example, the oncologist who is an employee of a physician organization is deemed to have the same compensation arrangements with the same parties and terms as the physician organization itself (i.e., contracts between the physician organization and a hospital). In another common example, if a hospital or other entity that provides DHS leases office space to a group practice, the lease will be treated as a direct arrangement between the landlord and each of the group’s

physicians. Individual physicians must ensure that their employer structures its arrangements to meet the applicable exception and re-examines existing contracts to ensure continued compliance with the Stark Law under Phase III. CMS offers limited protection to arrangements that were created before September 5, 2007.

In response to strong advocacy on behalf of academic medical centers, CMS delayed the effective date until Dec. 4, 2008 for certain compensation arrangements involving physician organizations and academic medical centers or integrated Section 501(c)(3) healthcare systems.

Physician Recruitment and Retention. Phase III broadens the ability to recruit physicians expanding the definition of “geographic area served by the hospital.” Phase III also loosens slightly the Phase II restriction against a pro rata apportionment of existing overhead costs in income guarantees for physicians joining an existing practice. Phase III permits such apportionment only when the practice is located in a rural area or a health professional shortage area, and the physician is replacing a retired, relocated, or deceased physician. Phase III also permits physician practices to impose reasonable practice restrictions on physicians and abandons the Phase II prohibition of non-competes and other restrictions not related to quality considerations. Finally, Phase III allows retention payments when the physician has a bona fide opportunity for future employment that would require a move of his or her practice at least 25 miles and outside the service area of the physician’s current hospital.

Other Changes. Phase III clarifies that the “fair market value” exception does not apply to office space leases, which must meet the specific exception for such leases.

CMS also broadens the fair market value exception to include compensation paid by a physician to a DHS entity. Because the more stringent requirements of the fair market value exception will now apply to payments made by physicians to an entity, the effect of this expansion is to *eliminate* the availability of the “payments by a physician” exception for such arrangements.

In the Preamble to Phase III, CMS interprets the “exclusive use” language in the rental of office space or equipment exceptions to require that space and equipment leases “be for established blocks of time,” which may require restructuring of shared lease arrangements.

CMS also clarifies in the Preamble that bona fide amendments unrelated to the volume or value of referrals do not violate the “set in advance” requirements under the office space rental, equipment rental, personal services arrangement, and fair market value exceptions. Parties may not change the compensation without entering into a new agreement, which may only be done after the first year, but they may amend other terms during the first year. For space leases that are terminated without cause, the parties may not enter into a new lease for all or part of the same office space within the first year following the beginning of the term, but may enter into another type of arrangement or lease for different office space.

Phase III is technical and complex. For more information, go to www.mintz.com for a link to a more comprehensive article, “Stark Phase III Regulation—Analysis and Comment.”

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