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CMS Clarifies Stark “Stand in the Shoes” Provision

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The proposed 2010 Medicare Physician Fee Schedule Update, published in the July 13, 2009 *Federal Register*[\[1\]](#) (the 2010 MPFS Update), clarifies two technical, but important, points of interpretation of the Stark regulations’ “stand in the shoes” provision. This article discusses the context for these clarifications, the specific rule changes used to effectuate them, and the implications of these rule changes for current financial arrangements between physicians and hospitals and other entities billing Medicare for one of Stark’s 10 designated health services (DHS Entities).

Background

The Stark II, Phase III rule (Phase III)[\[2\]](#) provided that a physician stands in the shoes of his or her physician organization (PO) for purposes of determining the physician’s compensation arrangements with hospitals and other DHS Entities. Phase III defined a “physician organization” as “a physician (including a professional corporation of which the physician is the sole owner), a physician practice, or a group practice that satisfies the Stark ‘group practice’ definition.” Under Phase III, when determining whether a direct or indirect compensation arrangement exists between a referring physician and a DHS Entity, the referring physician would stand in the shoes of another physician who employs the referring physician, his or her wholly owned professional corporation, a physician practice (that is, a medical practice) that employs or contracts with the referring physician, or a group practice of which the referring physician is a member or independent contractor. This rule change was intended to address the Centers for Medicare and Medicaid Services’ (CMS’) perception that the Stark direct compensation exceptions had been largely swallowed up by Stark’s indirect compensation analysis, introduced by CMS’ Stark II, Phase I rule (effective January 4, 2002), because most physicians practice in a PO that stands between them and hospitals and other DHS

Entities to which they make referrals for DHS. This had the apparently unintended effect of permitting most financial arrangements between referring physicians and DHS Entities to be analyzed under the Stark indirect compensation analysis, thereby avoiding the more burdensome requirements of the Stark direct compensation exceptions.

In response to industry concerns, especially the concerns of academic medical centers, CMS delayed implementation of the stand in the shoes rule as applied to academic medical centers and “integrated” 501(c)(3) organizations for the period December 4, 2007, through December 4, 2008.^[3] In the final 2009 inpatient prospective payment system (IPPS) update^[4] (2009 IPPS Update), effective October 1, 2008, CMS modified the stand in the shoes rule to permit—but not require—a physician to stand in the shoes of his or her PO if that physician had no ownership or investment interest in the PO. This option also was applied to “titular owners” of the PO. “Titular ownership” is an ownership or investment interest without any financial *indicia* of ownership or investment, e.g., voting stock stripped of any core economic rights associated with stock ownership. In sum, under current regulations, when determining a physician’s direct or indirect compensation arrangements with DHS Entities, physicians having more than a mere “titular” ownership in their PO stand in the shoes of their POs, and other physician members of the PO (e.g., employees and contractors) have the option of standing in the shoes of their POs.

Applying Stark Exceptions to Arrangements in Which a Physician Stands in the Shoes of His or Her PO

Phase III provided that, for purposes of applying Stark exceptions to arrangements in which a physician stands in the shoes of his or her PO, the “parties” to the arrangements are considered to be the DHS Entity and the PO (including all members, employees or independent contractor physicians) (codified at 42 C.F.R. §411.354(c)(3)(i)). Section 411.354(c)(3)(i) raised two questions of interpretation that CMS addresses in the 2010 MPFS Update, referred to here as the “signed writing” question and the “referrals” question.

The “Signed Writing” Question

Section 411.354(c)(3)(i) raised the question whether every member of a PO had to be a signatory to every contract between a PO and DHS Entity. Many of the Stark compensation exceptions require a signed writing. If all physician members of a PO are deemed to be “parties” to the PO’s compensation arrangements, then it arguably followed that all members of the POs had to be signatories to the PO’s compensation arrangements with DHS Entities in order to satisfy the applicable Stark compensation exceptions. CMS clarified in a January 2008 FAQ that physicians who stand in the shoes

of their POs are deemed to have signed any writing signed by a duly authorized signatory of the PO. However, after CMS limited the stand in the shoes rule to physician owners in the 2009 IPPS Update (effective October 1, 2008), the question arose whether this meant that, because only physicians standing in the shoes of their POs are deemed to have signed a writing signed by a PO's authorized representative, the PO's non-owner physician members would have to sign these writings because the Stark regulations still provided that all physician members are deemed to be parties to the arrangement. In the 2010 MPFS, CMS resolves this issue and adopts the common-sense position that only a single authorized signatory must sign a PO agreement. Section 411.354(c)(3)(i) would now read: "When applying the exceptions in §411.355 and §411.357 to arrangements in which a physician stands in the shoes of his or her physician organization, the relevant referrals and other business generated 'between the parties' are referrals and other business generated between the entity furnishing DHS and the physician organization (including all members, employees, and independent contractor physicians)."^[5] This means that all physician members would now be deemed "parties" to the PO's compensation arrangement with the DHS Entity solely for purposes of determining which physicians' referrals are relevant in evaluating the "takes into account" requirement, and not for purposes of determining who needs to sign the agreement.

The "Referrals" Question

Phase III placed all physician members of a PO in the shoes of the PO, and made all physician members "parties" to the arrangement for purposes of applying the Stark compensation exceptions. Most direct Stark compensation exceptions include some form of the requirement that the compensation paid under the arrangement not be determined in a manner that takes into account the volume or value of referrals or other business generated "between the parties." Thus, under Phase III, since all physician members were considered "parties" to the arrangement, all of the physician members' referrals were relevant to whether the compensation met this volume/value standard. However, after CMS revised the stand in the shoes rule in the 2009 IPPS Update to limit stand in the shoes to physician owners and to other physician members who elect to be treated as standing in the shoes of the POs, the question arose whether the relevant referrals for purposes of the compensation exceptions' volume/value standard were limited to the referrals of those physician members standing in the shoes of the PO, or whether the referrals of all of the PO's physician members were relevant.

The 2010 MPFS Update attempts to clear up this ambiguity by changing Section 354(c)(3)(i) to expressly state that "the relevant referrals and other business generated 'between the parties' are referrals and other business generated between the entity furnishing DHS and the physician organization (including all members, employees, and independent contractor physicians)."^[6] Consequently, even if a multi-physician PO has

only one physician-owner, if the applicable compensation exception prohibits compensation that is determined in a manner that takes into account the volume or value of referrals "between the parties," the compensation paid to the PO by a DHS Entity may not take into account the volume or value of referrals by any of the PO's physician members, even the non-owners. In effect, the referrals of the non-owner physicians are imputed to the physician-owner.

The practical effect of this clarification for the Stark analysis of lease arrangements between POs and DHS Entities is unclear, and CMS may need to make additional clarifications in the final rule. Per-unit or "click" leases are deemed by a special Stark rule^[7] to meet the volume/value standard of the Stark equipment lease exception unless the unit charges "reflect services provided to patients referred by the lessor to the lessee." CMS' rule change only requires consideration of referrals by all of the PO's physician members for purposes of determining referrals "between the parties." Since the proposed rule change uses the term "between the parties" in quotes when requiring the referrals of all of the PO's physician members to be considered when applying the volume/value standard of the compensation exceptions, there is an argument that it would not apply to "patients referred by the lessor to the lessee." This is likely an unintended result, since such unit rental compensation for space and equipment appear to be the very compensation arrangements CMS sought to address in the rule change. Accordingly, the precise implications of the rule change for current financial arrangements between POs and DHS Entities will require additional guidance from CMS, perhaps guidance it will provide in response to comments in the final 2010 MPFS update.

Conclusion

If CMS finalizes this Stark rule change as proposed, it will be clear that POs do not need to obtain the signature of more than the PO's authorized representative to meet the signed writing standard of many Stark compensation exceptions. While it is clear that this rule change would also mean that all of a PO's physician members (not just owners) are "parties" to a compensation arrangement between the PO and a DHS Entity for purposes of determining whether the compensation takes into account the volume or value of referrals "between the parties," in the case of per-unit leases, it is unclear whether non-owners not electing to stand in the shoes of their PO are also "lessors" for purposes of determining whether the compensation reflects referrals "by the lessor to the lessee."

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[1] 74 Fed. Reg. 33520.

[2] 72 Fed. Reg. 51012, 51026-29 (Sept. 5, 2007).

[3] 72 Fed. Reg. 64161 (Nov. 15, 2007).

[4] 73 Fed. Reg. 48434 (Aug. 19, 2008).

[5] 74 Fed. Reg. at 33677.

[6] 74 Fed. Reg. at 33677.

[7] 42 C.F.R. § 411.354(d)(2), (3).

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