

Implications of Final Stark II Rule For Physician Recruitment

On January 4, 2001, the Health Care Financing Administration ("HCFA") published the first of two phases of the final Stark II rule (the "Final Rule"), which governs referrals by physicians for "designated health services" under the Medicare program to entities or persons with which the physician (or a member of his/her immediate family) has a "financial relationship." Although Phase I of the Final Rule does not directly address the statutory exception covering physician recruitment (*i.e.*, Phase II of the rulemaking is expected to address Stark Law exceptions relating to "compensation arrangements," such as the physician recruitment exception), the rule nonetheless offers certain insights into HCFA's potential formulation of the exception in Phase II.

Compliance with the physician recruitment exception under the Stark Law requires, among other things, that the financial terms of the arrangement satisfy the "volume or value" standard, an element under several Stark Law exceptions. In accordance with the Volume/Value Standard, the amount of the compensation paid to the physician cannot be determined in a manner "that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician." Under HCFA's former interpretation of the standard (*i.e.*, in the proposed Stark Law regulations, published January 9, 1998), if the amount a physician can receive is fixed but whether or not he/she receives it is dependant on whether or not referrals are made to a particular provider, the arrangement may violate the Volume/Value Standard. HCFA, however, has adopted a contrary approach in the Final Rule, taking the position that an otherwise acceptable fixed, fair market value compensation arrangement will not implicate the Volume/Value Standard solely because, as a condition of payment, the physician must refer to a particular provider. The rationale underlying HCFA's current interpretation of the Volume/Value Standard is that, so long as the compensation payable to the physician is both fixed in advance for the arrangement's term and represents fair market value *for the services performed*, the physician does not have a financial incentive to inappropriately direct patients or business to the hospital that compensates him/her, the primary abuse that the Stark Law is designed to prevent.

Even under the relaxed Volume/Value Standard articulated in the Final Rule, hospitals cannot structure arrangements in which the compensation varies based upon, or is established by reference to anticipated, referrals to it by the recruited physician. Nonetheless, since HCFA noted in the commentary to the Final Rule its intent to apply the Volume/Value Standard consistently for all exceptions using that term, one may posit whether, under Phase II of the Final Rule, a hospital paying a fixed, commercially reasonable amount to induce a physician to relocate to the hospital's area will be permitted, for example, to require that physician to perform all his/her surgeries at its facilities, provided that the arrangement contains certain safeguards (*i.e.*, expressly permits the physician to refer elsewhere based on patient choice or the physician's medical judgment regarding the patient's best medical interest). In the physician recruitment context, HCFA's formulation of the Volume/Value Standard (which, as discussed above, would permit an "in-network" referral requirement) might, initially, appear to create a tension between what generally constitutes a permissible means of structuring a financial arrangement under the Final Rule, on one hand, and the fact that a recruitment arrangement satisfies the physician recruitment exception only if "the physician is not required to refer patients to the hospital," on the other hand. Insofar as the physician recruitment exception, however, does not focus on remuneration provided in exchange for services furnished to the hospital by a physician, but rather on remuneration provided to induce a physician to relocate in order to become a member of hospital's medical staff, the rationale underlying HCFA's relaxed interpretation of the Volume/Value Standard (*i.e.*, permitting "in-network" referral requirements) does not apply to the recruitment context.

Thus, the final Stark Law regulation governing physician recruitment in Phase II of the Final Rule likely will retain the prohibition against requiring the to-be-recruited physician to refer to the hospital (*i.e.*, arrangements involving recruitment assistance to a physician who will relocate and become a staff physician will continue to fall outside the recruitment exception if they include a referral requirement). Nonetheless, if, in connection with the recruitment, the hospital employs that physician under a bona fide employment relationship (which arrangement can qualify for the employment exception under the Stark Law), Phase II of the Final Rule likely will enable the hospital to impose an "in-network" referral requirement as a condition of the employment arrangement.