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Physician Timeshare Arrangements: New Stark Option for Sharing Space with Visiting Specialists and Others

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Recent Stark law amendments will make it easier for physicians to share space, and for hospitals to provide space, equipment, and services to visiting specialists and other physicians on a non-exclusive, "as-needed" basis. Hospitals and physicians may want to review their current lease arrangements to determine whether the new exception is a better fit for their current or future relationships and, if so, structure their arrangements accordingly.

Prior Law. The federal Ethics in Patient Referrals Act ("Stark") generally prohibits physicians from referring patients for certain designated health services ("DHS") payable by Medicare to entities with which the physician has a financial relationship unless the relationship is structured to fit within a regulatory safe harbor. (42 USC 1395nn; 42 CFR 411.353). Providing space or equipment to a referring physician generally creates a financial relationship that triggers Stark¹; consequently, such arrangements generally needed to be structured to satisfy Stark safe harbors for leases of space or equipment. Unfortunately, those safe harbors required, among other things, that the physician enter a formal lease that provided for exclusive use of the leased premises or equipment during defined lease terms (42 CFR 411.357(a)-(b)); the physician and lessor were generally **not** permitted to share space or equipment during the lease term, nor could the lease be on an "as needed" basis. Traditional timeshare arrangements in which physicians share space or equipment on a non-exclusive basis did not satisfy Stark, thereby forcing physicians and their landlords to enter formal, inefficient, and sometimes impractical lease arrangements.

New Timeshare Safe Harbor. Effective January 1, 2016, a new Stark exception, 42 CFR 411.357(y), permits physicians and hospitals or other physician groups to share "space, equipment, personnel, items, supplies or services" through non-exclusive timeshare arrangements if the following conditions are met:

- (1) The arrangement is set out in writing, signed by the parties, and specifies the premises, equipment, personnel, items, supplies, and services covered by the arrangement.
- (2) The arrangement is between a physician (or the physician's group) and
 - (i) a hospital; or
 - (ii) a physician organization of which the visiting physician

is not an owner, employee, or contractor. The new exception will not apply to DHS entities other than physicians, physician organizations, and hospitals (e.g., independent diagnostic testing facilities ("IDTFs") or labs. (80 FR 71329).

(3) The premises, equipment, personnel, items, supplies, and services covered by the arrangement are used (i) predominantly for the provision of evaluation and management ("E/M") services to patients; and (ii) on the same schedule.

The purpose of the new provision is to increase access to care, not to facilitate the physician's ability to provide DHS in supplemental medical practices sites; accordingly, "the use of office space by the physician *solely* or *primarily* to furnish DHS to patients (as opposed to E/M services) would not be protected by the new exception." (80 FR 71330).

(4) The equipment covered by the arrangement is (i) located in the same building where the E/M services are furnished (i.e., the same U.S. Postal Service address); (ii) not used to furnish DHS other than those incidental to the E/M services furnished at the time of the patient's E/M visit; and (iii) not advanced imaging equipment, radiation therapy equipment, or clinical or pathology laboratory equipment (other than equipment used to perform CLIA-waived laboratory tests). CMS reasoned that advanced imaging and the other excluded equipment were likely already available onsite and, therefore, allowing the physician to use such equipment and bill for such use would not promote access, and could create a potential for fraud or abuse. (See 80 FR 71330-31).

(5) The arrangement is not conditioned on the referral of patients by the physician who is a party to the arrangement to the hospital or physician organization of which the physician is not an owner, employee, or contractor.

(6) The compensation over the term of the arrangement is set in advance, consistent with fair market value, and not determined (i) in a manner that takes into account (directly or indirectly) the volume or value of referrals or other business generated between the parties; or (ii) using a formula based on: (a) a percentage of the revenue raised, earned, billed, collected, or otherwise attributable to the services provided while using the premises, equipment, personnel, items, supplies, or services covered by the arrangement; or (b) per-unit of service fees that are not time-based, to the extent that such fees reflect services provided to patients referred by the party granting permission to use the premises, equipment, personnel, items, supplies, or services covered by the arrangement to the party to which the permission is granted.

Thus, the new exception only applies if the compensation is based on forms such as a flat-fee or time-based formula (e.g., per-hour or per-day); timeshare arrangements based on a percentage of compensation, per-unit of service, or "per click" compensation formulas are not protected due to their potential to incentivize overutilization and patient steering. (80 FR 71331-32).

(7) The arrangement would be commercially reasonable even if no referrals were made between the parties. Arrangements that are above or below fair market value, or that do not make business sense except for inducing referrals, would be suspect.

(8) The arrangement does not violate the federal anti-kickback statute ("AKS") or any federal or state law or regulation governing billing or claims submission. The AKS is generally violated if "one purpose" of the transaction is to generate referrals for items or services payable by federal programs between the parties unless the transaction is structured to fit within an AKS exception, including the lease or services safe harbors. (See 42 CFR 1001.952(b)-(d)). Although providers should carefully analyze the AKS implications in each case, arrangements based on fair market value for needed space, items, or services should pose relatively little risk, especially when they promote access to care in the area.

(9) The arrangement does not convey a possessory leasehold interest in the space or equipment that is the subject of the arrangement. In other words, the arrangement only grants permission ("license") for the visiting physician ("licensee") to use the space, equipment and/or other items of the hospital or physician organization ("licensor"); it does not grant to the licensee a possessory leasehold or similar interest to use or occupy the space or equipment, *i.e.*, the licensor retains the right to control the property. (80 FR 71327-28). CMS warned,

We do not intend [that the new exception] protect potentially abusive arrangements such as exclusive-use timeshare arrangements that essentially function as full-time leases for medical practice sites; arrangements in which physicians are selected or given preferred time slots based on their referrals to the party granting permission to use the premises, equipment, personnel, items, supplies, or services; or consecutive short-term arrangements that are modified frequently in ways that take into account a physician's referrals.

(80 FR 71328).

Conclusion. Of course, physicians, physician organizations and/or hospitals may still use the lease safe harbors where appropriate; however, this timeshare exception creates a new opportunity for hospitals and other entities to share space, equipment, personnel, and services without violating Stark. Accordingly, hospitals and other physician organizations that are currently sharing or want to share space, equipment, personnel or other items should consider revising their current agreements or entering new timeshare arrangements consistent with the new rules.

For questions regarding this update, please contact:

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¹The prohibition would generally not apply to situations where, e.g., a hospital allowed medical staff members to use hospital space and equipment but each party billed payers for their respective services. (See 80 FR 71321).

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