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Stark Law Revisions: Don't Abandon FMV Just Yet!

The Centers for Medicare and Medicaid Services (CMS) released final rules on November 20, 2020 with changes to the Stark Law to facilitate care coordination and value-based care.

The Stark Law, also known as the Physician Self-referral Law, prohibits physicians from referring patients for “designated health services” (“DHS”) payable by Medicare or Medicaid to entities with which the physician or an immediate family member has a financial relationship, *unless an exception applies*. Financial relationships include both ownership and investment interests, and compensation arrangements. DHS include clinical lab services, PT/OT/SLP services, radiology, DME and supplies, parenteral and enteral nutrients, prosthetics, home health services, outpatient prescription drugs, and inpatient and outpatient hospital services.¹ Typically, exceptions to this referral prohibition related to compensation arrangements contain a Fair Market Value requirement.

We believe changes to the Stark Law are only applicable to 100% value-based contracts, a situation unlikely to be realized by most providers during the next five-plus years. Nevertheless, given increasing penetration of Medicaid Managed Care and Medicare Advantage, and growth of Accountable Care Organizations (“ACOs”), value-based arrangements will make up an increasing proportion of physician compensation.

Transitioning compensation models

The evolution of physician compensation models has been lagging the changes to reimbursement focused on value-based care. Only 7.0% of the total cash compensation for primary care physicians includes value-based incentive payments.²

¹ “A Roadmap for New Physicians: Fraud and Abuse Laws.” Office of the Inspector General (OIG). <https://oig.hhs.gov/compliance/physician-education/index.asp>

² According to New Sullivan Cotter Survey Results, Physician Compensation Programs are Evolving to Address an Increasingly Complex Operating Environment; December 3, 2019 <https://www.prnewswire.com/news-releases/according-to-new-sullivan-cotter-survey-results-physician-compensation-programs-are-evolving-to-address-an-increasingly-complex-operating-environment-300968011.html>

The Medicaid Managed Care penetration rate is 70% (52.8 million), whereas that of Medicare Advantage is 39% (24.1 million).^{3,4} Approximately 12.3 million Medicare beneficiaries were enrolled in 649 ACOs; 10.5 million (85.4%) in the Medicare Shared Savings Program (MSSP) and 1.8 million (14.6%) in Next Generation ACOs.⁵ Value-based care penetration remains limited in the commercial market.

Physician compensation has historically been driven by productivity, i.e., the volume of services. Value-based care is driven by clinical quality, patient experience and the total cost of care. Panel management is also being added as a measure of performance. The transition from volume to value adds complexity to the process of managing physician compensation.

The Healthcare Effectiveness Data and Information Set (HEDIS), comprising 71 measures across eight domains of care, is used by more than 90% of health plans to measure performance; 191 million people are enrolled in plans using HEDIS.^{6,7} The domains include effectiveness of care (prevention and screening, condition treatment, medication management, care coordination, overuse/appropriateness), access/availability of care, utilization (procedure frequency), risk-adjusted utilization (hospital admissions and readmissions, hospital admissions for potentially preventable condition, emergency department use) and experience of care.⁷

Role of Fair Market Value

As set forth above, under the Stark Law, physicians are prohibited from making referrals for DHS to an entity with which they have a financial relationship unless an exception applies, and most exceptions contain a Fair Market Value

requirement. CMS defines Fair Market Value as “the value in arm’s-length transactions, consistent with the general market value of the subject transaction.”⁸ “General market value” means, with respect to compensation for services, the compensation that would be paid at the time the parties enter into the services arrangement as the result of bona fide bargaining between well-informed parties that are not otherwise in a position to generate business for each other.⁹ The fair market value for physician compensation is usually determined with reference to recognized physician compensation and production surveys published by such organizations as the American Medical Group Association (AMGA), the Medical Group Management Association (MGMA) and SullivanCotter. *However*, per §411.357(aa) of the Federal Register entitled “Exceptions to the referral prohibition related to compensation arrangements,” only “arrangements that facilitate value-based health care delivery and payment” will *not* contain an FMV requirement, leaving most arrangements still subject to this stringent requirement.

Capitation as a reality, not an abstraction

Full-risk providers do exist, however, such that — assuming they meet all the relevant requirements provided under the latest CMS guidance — they now do not have to abide by the Fair Market Value requirement, thereby enabling them to offer premium physician compensation where appropriate. This potentially represents a competitive advantage in a period of growing physician shortages.

Examples of capitated, risk-adjusted providers include Oak Street Health and ChenMed, both of which have re-engineered the care delivery process.

³ Medicaid Managed Care Penetration At 70% Nationally; 0% To 100% At The State Level: New OPEN MINDS Analysis, 2011 & 2018; February 11, 2020 <https://www.globenewswire.com/en/news-release/2020/02/11/1983246/25095/en/Medicaid-Managed-Care-Penetration-At-70-Nationally-0-To-100-At-The-State-Level-New-OPEN-MINDS-Analysis-2011-2018.html>

⁴ A Dozen Facts About Medicare Advantage in 2020; January 13, 2021 <https://www.kff.org/medicare/issue-brief/a-dozen-facts-about-medicare-advantage-in-2020/>

⁵ National Association of ACOs. NAACOS Overview of the 2018 Medicare ACO Class. <https://www.naacos.com/overview-of-the-2018-medicare-aco-class#:~:text=As%20of%202018%2C%20approximately%2012.3,%20percent%20of%20Medicare%20beneficiaries>

⁶ HealthyPeople.gov Healthcare Effectiveness Data and Information Set (HEDIS) <https://www.healthypeople.gov/2020/data-source/healthcare-effectiveness-data-and-information-set#:~:text=Description%3A,across%208%20domains%20of%20care>

⁷ NCQA HEDIS Measures and Technical Resources <https://www.ncqa.org/hedis/measures/>

⁸ CMS Finalizes and Clarifies Key Valuation Terms in the Stark Law. Jones Day; January 20, 2021 <https://www.jdsupra.com/legalnews/cms-finalizes-and-clarifies-key-4024835/#:~:text=FMV%20for%20general%20application%20means,%2C%22%20which%20had%20been%20proposed>

⁹ 42 C.F.R. § 411.351, definition of *fair market value*

Oak Street Health currently operates more than 80 primary care centers focused on the quality of care at full financial risk of its Medicare patients. They enter globally capitated or full-risk contracts with Medicare Advantage plans to receive a percentage of each members' monthly premium ("PMPM").¹⁰

ChenMed operates 95 primary care centers targeting the elderly, including dual-eligible. They have at-risk contracts with more than 20 Medicare Advantage plans and have integrated social determinants of health into their practice. Physicians have a maximum panel of 450 patients, 20%-25% of the average.¹¹

Although Oak Street and ChenMed are fully capitated, we do not have sufficient information to determine whether they fully meet the requirements for a value-based exception to the Stark Law.

Bottom Line

The new Stark Law exceptions apply only to entities that can comply with the new value-based arrangement conditions. Accordingly, most parties will still find that FMV will apply when it comes to compensating physicians. FTI Consulting healthcare valuation experts routinely determine the FMV of a myriad of physician compensation arrangements.

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¹⁰ <https://investors.oakstreethhealth.com/overview/default.aspx>

¹¹ ChenMed Executes Contracts for 18 of 26 New Medical Center Openings in 2021. <https://www.chenmed.com/news/chenmed-executes-contracts-18-26-new-medical-centers-opening-2021>

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