

## New Year, New Stark Law Provisions

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**PRACTICES** Healthcare and Life Sciences, Healthcare Transactions and Regulatory

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To be applied to all services furnished under the Medicare Physician Fee Schedule (“**PFS**”) on or after January 1, 2016, the Centers for Medicare & Medicaid Services (“**CMS**”) has implemented the final CY 2016 PFS rule (“**the Final Rule**”) in response to health care delivery and payment systems reform and in the hopes of reducing the burden on providers and facilitating compliance with the Stark regulations. This marks the first set of substantial changes to the Stark regulations since the “Phase IV” changes were issued in 2009.

The Final Rule’s major changes include updates to the payment policies, payment rates, and quality provisions for services covered by the PFS. It also updates the Stark regulations with two new exceptions to the physician self-referral prohibition, changes the requirements for physician-owned hospitals, and offers several clarifications to the Stark regulations.

### **New Exceptions**

The two new exceptions to the Stark law involve the recruitment of non-physician practitioners and timeshare arrangements.

#### ***Recruitment of Non-Physician Practitioners***

In adding the exception for the recruitment of non-physician practitioners, CMS acknowledged significant changes to health care delivery and payment systems, as well as the projected shortages in primary care providers, by finalizing a new exception for remuneration from a hospital, federally qualified health center (“**FQHC**”), or rural health center (“**RHC**”) to a physician in order to assist the physician in recruiting and compensating an employee or independent contractor non-physician practitioner (“**NPP**”) who furnishes “substantially all” primary care services or mental health services to patients of a physician’s practice. For purposes of the new exception, NPPs include clinical social workers, clinical psychologists, physician assistants, nurse practitioners, clinical nurse specialists, and certified nurse midwives. However, NPPs do not include certified registered nurse anesthetists, dietitians and physical therapists.

The amount of the remuneration may not exceed fifty percent of the actual aggregate compensation to the NPP (including any signing bonus and benefits), and the exception may be used only once in a three-year period for the same physician. Additionally, the exception is not available for indirect compensation arrangements, which must satisfy the indirect compensation arrangement exception. For example, the exception cannot be used to provide assistance to a physician who contracts with a staffing company that will provide an NPP to the physician’s practice.

#### ***Timeshare Arrangements***

CMS also finalized a new exception to protect timeshare arrangements between hospitals or physician organizations (the licensor) and physicians (the licensee) for the non-exclusive use of the

hospital's or physician organization's space, equipment, personnel, supplies, or services if they meet specified requirements, including:

- the arrangement must specify the equipment, personnel, supplies, or services, and it must be in writing and signed by the parties;
- compensation over the course of the term of the arrangement must be set in advance, consistent with fair market value and commercially reasonable without taking into account the volume or value of referrals;
- compensation must not use a formula based on a percentage of revenue raised, earned, billed, collected, or otherwise attributed to the services provided or a formula based on a per-unit of service fee that is not time-based if the fees are for services referred to the licensor or the licensee;
- the premises must be used predominantly for evaluation and management (“**E/M**”) services, and any equipment must be located in the same building where the E/M services and designated health services (“**DHS**”) are furnished; and
- all locations included in the arrangement for furnishing E/M and DHS services must be on the same schedule.

CMS finalized the new exception to address concerns that timeshare arrangements, which are fairly common and beneficial in some circumstances, could generally fail to satisfy existing exceptions. For example, oftentimes, timeshare arrangements cannot meet the space and equipment arrangement exceptions, which require “exclusive use” when used by the lessee, or the fair market value exception, which is not available for space leases.

## Clarifications

The Final Rule also includes clarifications and modifications to existing Stark law exceptions, including the following provisions:

- Written Agreement Requirement
- Definition of Remuneration
- “Stand in the Shoes”
- Temporary Noncompliance with Signature
- Holdover Arrangements for Space, Equipment, and Personal Services
- Fair Market Value
- “Incident To”

For details of these clarifications, please [click here](#).

In addition to the above new exceptions and clarifications, CMS is planning on issuing a report to Congress to determine if additional rulemaking may be necessary in light of evolving payment models integrating physicians and other health care entities to achieve population health and reduce costs.