

CMS ISSUES PROPOSED RULE AFFECTING SPACE LEASING ARRANGEMENTS UNDER THE STARK LAW

OVERVIEW

On July 8, the Centers for Medicare & Medicaid Services ("CMS") published a proposed rule pertaining to payment policies under the Physician Fee Schedule for CY 2016 ("Proposed Rule").¹ In addition to changes to the Physician Fee Schedule and other Medicare Part B payment policies, the Proposed Rule addresses modifications to the Stark Law and provides guidance on CMS's interpretation of existing Stark Law exceptions.

This article briefly summarizes the proposed modifications to the Stark Law that affect leasing arrangements. A summary of all of the changes described in the Proposed Rule can be found [here](#).

TIMESHARE OR PART-TIME OCCUPANCY ARRANGEMENTS

In the Proposed Rule, CMS discusses timeshare or part-time leasing arrangements and some of the challenges of administering these arrangements. A timeshare or part-time arrangement typically provides a physician with the exclusive use of office space during scheduled time periods. The space is often fully furnished with basic medical office equipment, furniture, supplies and support personnel so that the physician is able to use the space, on a turn-key basis, to see patients during scheduled times.

Through the administration of the Stark Physician Self-Referral Disclosure Protocol ("SRDP"), CMS has come to recognize the importance of timeshare arrangements in situations where a full-time arrangement is not necessary or practical, for example, in rural or underserved areas. CMS also recognizes some of the challenges of structuring timeshare arrangements in a compliant manner under the Stark Law, namely the "exclusivity" requirement.

In particular, CMS notes that a timeshare arrangement may, on its face, more closely resemble a license arrangement than a leasing arrangement. A license, according to CMS, confers upon the beneficiary a privilege to use space and equipment on a temporary or limited basis. On the other hand, a lease confers a possessory interest in the space and equipment that is more substantial. This distinction may create a scenario where a timeshare arrangement, structured as a license, does not provide or permit the exclusive use of space, which is a requirement under the current Rental of Office Space exception.² Further, timeshare arrangements structured as licenses typically have terms less than one (1) year, which also would be in contravention of the current Rental of Office Space exception. Following that line of reasoning, CMS notes that a timeshare arrangement structured as a license may not satisfy the Rental of Office Space exception.

In the Proposed Rule, CMS notes that providers must be given more flexibility to structure timeshare arrangements to ensure access to specialty care, particularly in rural and underserved areas. As a result, CMS is proposing a new Stark Law exception that protects timeshare license arrangements that satisfy certain requirements. The requirements for the proposed exception are as follows:

- The arrangement is set out in writing and signed by the parties;
- The arrangement specifies the premises, equipment, personnel, items, supplies and services covered by the arrangement;
- The arrangement is between a hospital or physician organization (the licensors) and a physician (the licensee) for use of the hospital/physician organization's premises and other equipment and personnel;
- The licensed premises are used predominantly for the evaluation and management of the licensee's patients;
- Any licensed equipment is located in the space and must meet certain criteria (e.g., does not apply to advanced imaging, radiation therapy or clinical/pathology laboratory equipment);
- The arrangement is not conditioned on referrals;
- The compensation is set in advance, is consistent with fair market value and does not take into account the volume or value of referrals

or other business generated between the parties;

- The arrangement is commercially reasonable; and
- The arrangement does not violate the Anti-Kickback Statute or other state or federal laws or regulations governing billing or claims submission.

The proposed new exception appears to be limited to license arrangements where the occupant is given non-exclusive use of the space. CMS notes that the Rental of Office Space exception would continue to be the only exception that would apply to leasing arrangements (full-time and timeshare arrangements) where the occupant is given exclusive use of the premises. In addition, the exception is limited to arrangements where the licensor is a hospital or physician organization; it does not protect arrangements where the licensor is another type of DHS entity (i.e., a laboratory).

CMS is seeking comments to determine whether the exception is sufficiently broad to improve access to care, whether the exception should be limited to rural and underserved areas and whether the proposed in-suite equipment location requirements should be expanded. CMS is also proposing and is seeking comments regarding the continued prohibition of per unit-of-service and percentage compensation methodologies for timeshare arrangements.

HOLDOVER ARRANGEMENTS

In the Proposed Rule, CMS discusses its rationale for establishing a term of one (1) year for various arrangements, including leasing arrangements. CMS notes that the requirement was designed to establish stable arrangements between providers that cannot be renegotiated frequently to reflect the current volume or value of referrals. Along the same lines, CMS has historically concluded that holdover arrangements could pose an increased risk of abuse among providers. As such, CMS has hitherto limited holdover arrangements to a period of six (6) months. In prior rulings, CMS determined that there was little risk of abuse if the holdover period was limited in duration and the arrangement continued on the same terms and conditions.

Through its administration of the SRDP, CMS has reviewed numerous leasing arrangements that were non-compliant solely because the occupant's arrangement expired by its terms and then continued in holdover beyond a period of six (6) months. CMS has now concluded that a holdover arrangement that extends beyond a period of six (6) months may not pose the risk initially contemplated. CMS believes that holdover arrangements, even for an extended period of time, should be permissible so long as certain safeguards are put into place. According to CMS, safeguards must be established to prohibit frequent renegotiation of short term arrangements based on the current volume or value of referrals. Safeguards must also ensure that compensation remains consistent with fair market value for the space during the holdover period.

To memorialize its new position, CMS is proposing to amend the holdover provision in the Rental of Office Space exception (and other compensation exceptions) to permit indefinite holdovers, provided that certain safeguards are met. Alternatively, CMS is proposing to allow holdover arrangements for definite periods of time longer than six (6) months (e.g., one (1) year, three (3) years, etc.) or for a period of time equivalent to the term of the immediately preceding arrangement.

In terms of safeguards, CMS is proposing to amend the Rental of Office Space exception to include the following requirements that will apply to holdover arrangements:

- The original leasing arrangement must have complied with the Rental of Office Space exception at the time it expired.
- The holdover arrangement must be on the same terms and conditions as the immediately preceding arrangement.
- The holdover arrangement must continue to satisfy the requirements of the Rental of Office Space exception.

CMS supplemented the safeguards with commentary on the type of evidence that may be necessary to establish that a holdover arrangement continued on the same terms and conditions as the immediately preceding arrangement. CMS notes that documentary evidence may be required, including evidence of the expired lease and a collection of other documents, including contemporaneous documents evidencing the course of conduct between the parties.

CMS also provides commentary on fair market rents during a holdover arrangement. CMS notes that rent must remain consistent with fair market value throughout the entire holdover period. If rent falls below fair market value at any time during the holdover period, the

arrangement will fail to meet the exception. CMS did not discuss whether or not a holdover premium can be charged by a landlord during a holdover period. Instead, CMS stated that if the terms of the arrangement change during a holdover period, the change will cause the holdover to become a new arrangement subject to the terms of the Rental of Office Space exception.

CMS is seeking comments on whether additional safeguards, if any, are necessary to ensure that holdover arrangements beyond a period of six (6) months do not pose additional risk of abuse.

WRITING REQUIREMENT

Through its work overseeing the SRDP, CMS has also learned that providers may have misinterpreted the writing requirement under various compensation exceptions. CMS specifically refers to the Rental of Office Space exception. In particular, CMS notes that references in the exception to an “agreement” that is “set out in writing” have been the subject of misinterpretation.

CMS is proposing to clarify the writing requirement in the Rental of Office Space exception, along with other compensation exceptions. In the Proposed Rule, CMS indicates that there is no requirement that a leasing arrangement be documented in a single, formal contract. CMS notes that a collection of documents, including contemporaneous documents evidencing the course of conduct between the parties, may constitute satisfactory documentation, depending on the particular facts and circumstances of an arrangement.

To clarify its position, CMS is proposing to replace the word “agreement” with “leasing arrangement” in the Rental of Office Space exception so that 411.357(a)(1) reads as follows: “the lease arrangement is set out in writing, is signed by the parties, and specifies the premises it covers.”

TERM REQUIREMENT

Certain compensation exceptions under the Stark Law, including the Rental of Office Space exception, require that the “agreement” have a term of at least one (1) year. CMS notes that providers submitting self-disclosures to the SRDP have asked whether the term of a particular arrangement must be specifically described in writing.

CMS is proposing to modify the Rental of Office Space exception (among other compensation exceptions) to clarify its position on this matter. In its commentary to the Proposed Rule, CMS notes that a formal contract or other document with an explicit provision identifying the “term” is generally not required. However, the arrangement, as a matter of fact, must last for at least one (1) year to satisfy the requirement. In the alternative, the parties must be able to demonstrate that the arrangement was terminated during the first year and that the parties did not enter into a new arrangement for the same space. CMS notes that a collection of documents, including contemporaneous documents evidencing the course of conduct between the parties, can be used to establish that the arrangement in fact lasted for the required period of time.

To clarify its position, CMS is proposing to replace the word “agreement” with “lease arrangement” in the Rental of Office Space exception so that 411.357(a)(2) reads as follows: “the term of the lease arrangement is at least 1 year.”

TEMPORARY NONCOMPLIANCE WITH SIGNATURE REQUIREMENT

Finally, CMS is proposing to amend the special rule for arrangements involving temporary noncompliance with signature requirements to allow the parties up to 90 days to obtain all required signatures, regardless of whether the late signature is advertent or inadvertent. The proposed exception maintains some of the restrictions under the current regulations, including that an entity may make use of the 90 day rule once every three years for the same referring physician.

Comments on the Proposed Rule must be received by CMS no later than 5:00 PM on September 8, 2015. Comments may be submitted electronically, via mail or by hand delivery.

If you are interested in submitting a comment or would like additional information about the impact of the Proposed Rule on your space leasing arrangements, please contact:

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- Your regular Hall Render attorney.

Please visit the Hall Render Blog at <http://blogs.hallrender.com/> for more information on topics related to health care law.

¹ For a full text copy of the Proposed Rule, click [here](#).

² 42 C.F.R. § 411.357(a)