

THE NEW STARK EXCEPTION FOR TIMESHARE LICENSES

Last week, CMS promulgated a final rule that creates a new "timeshare license" exception to the Stark Law. A few days ago, we reported on this and other changes [here](#) but believe that the timeshare topic merits additional discussion. The new exception was created due to the difficulty hospitals and physicians experience when trying to fit timeshare arrangements into the Stark Law rental of office space exception and the space rental safe harbor under the Anti-Kickback Statute. The new exception recognizes the unique character and utility of timeshare arrangements particularly in rural and medically underserved areas. The exception provides as follows:

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 compensation over the term of the arrangement is set in advance and is consistent with fair market value.
3. Such compensation is 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.
4. The agreement would be commercially reasonable even if no referrals were made between the parties.
5. 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 time schedule as DHS services (if any) are provided.
6. The equipment covered by the arrangement is: (i) located in the same building where the E/M Services are furnished; (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).
7. The arrangement does not convey a possessory leasehold interest in the office space that is the subject of the arrangement.

Importantly, the new exception differs from the Stark Law rental of office space exception and the Anti-Kickback Statute space rental safe harbor in that it **does not** require the following:

- A minimum term of 1 year;
- Confirmation that the space does not exceed that which is reasonable and necessary to accomplish a legitimate or commercially reasonable business purpose;
- Exclusive use of the space being occupied; and
- A specific occupancy schedule, a description of the precise length of each occupancy period or the exact rent for such intervals.

The timeshare exception, however, contains the new E/M concept, but many timeshare arrangements likely meet this requirement already. In addition, the timeshare exception, like the Stark rental of office space exception and the Anti-Kickback Statute space rental safe harbor, still requires that all elements used by the licensee (premises, supplies, equipment personnel) be set in advance and be consistent with fair market value. As anyone who has undertaken to determine the fair market value of timeshare rental agreements can attest, the exercise can be complicated. While some of that complexity will remain under the new exception, we see merit in utilizing the exception for arrangements where physicians provide primarily E/M services.

If you would like additional information about this topic, please contact:

- Robert A. Hicks at (317) 977-1433 or at rhicks@hallrender.com;
- Andrew A. Dick at (317) 977-1491 or at adick@hallrender.com;
- Douglas J. Kochell at (317) 977-1412 or at dkochell@hallrender.com; or
- Your regular Hall Render attorney.