

CMS CLARIFIES THE APPLICATION OF DIRECTED REFERRALS PERMITTED UNDER THE STARK LAW

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As described in a broad prior client advisory found [here](#), the Centers for Medicare and Medicaid Services (CMS) published final regulations on November 20, 2020, that make significant modifications to the federal physician self-referral law frequently known as the Stark law. Most of the final regulations take effect on January 19, 2021. One clarification involved the application of a “directed referrals” provision in a physician arrangement.

Prior to the final regulations, Stark regulations indicated that compensation payable to a physician in an arrangement that otherwise satisfies one of several different compensation exceptions is not deemed to take into account the volume or value of referrals simply by virtue of being predicated on the physician making referrals to a particular provider, practitioner, or supplier. The directed referral requirement may not apply with respect to patient choice, a physician exercising independent medical judgment, or if the patient’s insurer directs care elsewhere. Directed referrals are also permitted under similar requirements within the new value-based exceptions.

When a directed referral requirement applies and an applicable non-value-based compensation exception is utilized, it must be in writing and signed by the parties. Such a compensation arrangement would also need to be set in advance and consistent with fair market value, even if this is not required by the applicable exception being relied upon for compliance.

For directed referrals, the final regulations now also require that neither the existence of the compensation arrangement nor the amount of the compensation may be contingent on the number or value of a physician’s referrals to a particular provider, practitioner, or supplier. The final rule also indicated that directed referral provisions may require a physician to refer an established percentage or ratio of the physician’s referrals to a particular provider, practitioner, or supplier.

CMS clarified within responses to public comments that the final rule on directed referrals prohibits “making the existence of a compensation arrangement contingent on the number or value of the physician’s referrals to a particular provider, practitioner, or supplier.” Adverse action should not be taken against a physician for failing to refer a minimum number of patients or if a specified target value of referrals was not made. However, if an arrangement were terminated if the physician failed to achieve a specified percentage of referrals of patients to a particular provider, practitioner, or supplier, this would not violate the directed referral limitations.

Providers should review their arrangements with physicians to determine if directed referral requirements are consistent with the final rule. Please contact a member of Hancock Daniel's [Fraud & Abuse](#) team you have any questions about the impact of this rule change or if we can assist with a review of your physician contracts.

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