

Stark Rule's 'Stand in the Shoes' Provisions Pushed Back, for Some, to December 2008

In a notice to be published in the Federal Register on November 15, 2007 and effective immediately upon publication, the Centers for Medicare and Medicaid Services ("CMS") will delay until December 4, 2008, the application of the "stand in the shoes" provisions added in the Stark Phase III final rule for certain qualifying organizations. The one-year delay will apply only to certain compensation arrangements involving physician organizations and certain academic medical centers ("AMC") or integrated nonprofit health care systems.

CMS published the Stark Phase III rules on September 5, 2007, with an effective date of December 4, 2007. One of the more significant changes was the narrowing of the definition of indirect compensation arrangements and the inclusion of new provisions under which referring physicians will be treated as "standing in the shoes" of their "physician organizations." For example, in the AMC context, the Phase III rules will cause a physician to stand in the shoes of his or her faculty practice plan ("FPP") if it is organized as a separate legal entity. When the FPP is the only entity intervening between the physician and a DHS entity, such as a teaching hospital, the result of the "stand in the shoes" rule is that the physician will be deemed to have the same direct compensation arrangements with the teaching hospital that the FPP has, and a direct exception for those arrangements must be found. The indirect compensation arrangement exception will no longer be available.

Since it was first announced, the new rule has created great concern in the academic community and beyond regarding the treatment of mission support payments. Whether it is in the context of an AMC or a similarly situated integrated nonprofit health system (including a hospital affiliate and a nonprofit physician practice affiliate), it is not likely that these mission support arrangements will be able to meet the fair market value requirements of any of the currently existing direct compensation arrangement exceptions because support payments are not usually tied to specific items or services but, instead, are structured to support the overall mission.

Recognizing that the application of the "stand in the shoes" provisions of Phase III may require renegotiation of many contracts and the restructuring of many common arrangements involving AMCs and integrated nonprofit health care systems, CMS published this notice stating its intent to evaluate the impact of the new provisions on the following situations:

- compensation arrangements between a faculty practice plan affiliated with an academic medical center, as described in 42 C.F.R. §411.355(e)(2), and another component of the same academic medical center; and
- compensation arrangements between an integrated 501(c)(3) health care system and an affiliated physician practice in the same integrated section 501(c)(3) health care system.

It should be noted that if CMS intends to limit the delay in applicability of the "stand in the shoes" provisions only to those AMCs meeting the definition set forth in §411.355(e)(2) of the Stark regulations, the relief granted by this notice may be far more limited than it appears on its face. Similarly, CMS's definition of the term "integrated section 501(c)(3) health care system" as reaching only those nonprofit systems in which "each affiliated organization qualifies for

exemption” as a section 501(c)(3) organization, will also limit the number of nonprofit integrated health systems that will be able to qualify for the delay.

The application of the “stand in the shoes” provisions to these situations, i.e. to arrangements that involve qualifying organizations, will be delayed for 12 months, until December 4, 2008. CMS cautions that this delay is limited solely to the specified situations and that the anti-kickback statute continues to apply to AMCs and integrated nonprofit health care systems. For the full text of the release, please [click here](#).

Contact Information

For further information, please contact your usual Ropes & Gray lawyer or any of the following:

Nancy E. Forbes

617-951-7492

nancy.forbes@ropesgray.com

Stephen A. Warnke

212-841-0681

stephen.warnke@ropesgray.com

Mitchell J. Olejko

415-315-6328

mitchell.olejko@ropesgray.com

