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The Stark Law requires entities that offer designated health services (DHS) to keep track of what otherwise would be minor, non-cash items given to certain physicians. Because the term “financial relationship” under the Stark Law is interpreted very broadly, all items, services, and benefits (in addition to cash or cash equivalents) in any form, must be considered. However, not every item, benefit, or service must be tracked for every physician, and not in every instance. The particular nuances require careful examination.

This article reviews the Stark Law and its strict enforcement requirements, examines the non-monetary compensation exception and exception for certain medical staff benefits, reviews a provider’s strategy for tracking non-monetary compensation expenditures, and explains self-disclosure of violations of the Stark Law.

**The Stark Law**
The Stark Law prohibits a physician from making a referral to an entity for the furnishing of certain services for which Medicare would otherwise pay, if the provider or member of the provider’s immediate family had a financial relationship with the entity, unless an exception applies. Since its original passage, the Stark Law’s implementing regulations have been amended multiple times, expanding the prohibition on certain provider referrals for DHS and adding and refining various exceptions. The Stark Law is a strict liability statute, meaning that no intent to violate the statute is necessary for a provider to be in violation.

The Stark Law contains significant sanctions for violations, including denial of
payment, refunds of amounts collected in violation of the law (even if the provider was unaware of the violation at the time the claim was submitted or when the reimbursement was received), and exclusion from the Medicare or Medicaid programs. In addition, financial arrangements that do not fully comply with a Stark Law exception may result in significant financial penalties or obligations to the entity that billed for the service referred by the physician with whom the entity had a non-compliant arrangement.

**Non-monetary compensation exception**

The exceptions to the Stark Law\(^2\) include an exception to compensation relationships for certain “non-monetary compensation.”\(^3\) The non-monetary compensation exception allows DHS entities to confer on each referring physician (i.e., each unique provider number) a relatively nominal amount of non-cash items, services, and benefits per year (for 2014, this amount is $385). The nominal amount is adjusted annually and is updated annually by Centers for Medicare & Medicaid Services (CMS).\(^4\) This annual limit applies to each physician, but cannot be aggregated to make a larger gift to a group practice or other group of physicians. For example, a $1,000 oil painting cannot be given to a four-physician practice and divided by four. The Stark Law will consider this gift to be indivisible, representing a gift valued at $1,000 to each of the four physicians. The exception also permits a hospital with an organized medical staff to host a staff appreciation event once a year, such as a medical staff holiday party, without regard for the limit, although any gifts or gratuities offered in connection with the event are subject to the limit.

Three requirements must be satisfied under the Stark Law non-monetary compensation exception: (1) The benefit cannot be determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician; (2) the benefit may not be solicited by the physician or anyone affiliated with the physician’s practice; and (3) the benefit may not violate the Anti-Kickback Statute or any federal or state law or regulation that governs billing or claims.

If an entity has inadvertently provided non-monetary compensation to a physician in excess of the annual limit, a “payback” option is available once every three years for the physician. An entity that mistakenly exceeds the annual limit may remain compliant with the Stark exception if (1) the value of the non-monetary compensation is no more than 50% above the annual limit; and (2) the physician must pay back the amount of extra non-monetary compensation to the entity by the earlier of either the end of the calendar year in which it was received, or within 180 days following the date that the physician received it. This “payback” option may prove to be of limited utility when a violation occurs at the end of the calendar year, due to non-monetary compensation delivered during the holiday season.
Incidental medical staff benefits

Another Stark Law exception, separate and apart from the non-monetary compensation exception, allows hospitals with an organized medical staff to offer “medical staff incidental benefits.” This exception permits hospitals to offer very nominal non-cash items or services (e.g., meals, parking, or other incidental services) that are used on the hospital’s campus. Like the non-monetary compensation exception, an annual limit applies.6

To comply with this Stark Law exception, all of the following conditions must be met:

- The benefit must be offered to (but not necessarily accepted by) all medical staff members of the same specialty without regard to the volume or value of referrals or other business generated between the parties;
- The benefit must be provided only during periods when the physician is making rounds or engaged in other services or activities that benefit the hospital or its patients;
- The benefit is used only on the hospital’s campus;
- The benefit is reasonably related to the provision of, or designed to facilitate directly or indirectly the delivery of, medical services at the hospital;
- The benefit is of low value and less than the annual limit with respect to each occurrence of the benefit;
- The benefit is not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties; and
- The benefit does not violate the Anti-Kickback Statute or any federal or state law or regulation governing billing or claims.

Also, any other facilities and healthcare clinics (i.e., federally qualified health centers) that have bona fide medical staffs may provide benefits under this exception on the same terms and conditions applied to hospitals. So, DHS entities without bona fide medical staffs cannot use this exception.

The medical staff incidental benefits exception was not intended to cover the provision of off-site benefits, such as restaurant dinners or theater tickets, which must comply with the exception for non-monetary compensation. However, the medical staff incidental benefits exception specifically recognizes that Internet access, pagers, or two-way radios, used away from the campus only to access hospital medical records or to access patients or personnel who are on the hospital campus, as well as the identification of the medical staff on a hospital website or in hospital advertising, will meet the “on campus” requirement. Unlike the non-monetary compensation exception, there is no “payback” allowance for the medical staff incidental benefits exception, and strict compliance is required. However, unlike the non-monetary compensation exception, there is no annual limit to the aggregate amount of medical staff incidental benefits that may be offered, so long as the hospital stays below the per occurrence limit of $32.

To give or not to give—adding it all up

As noted above, the medical staff incidental benefits exception establishes a per-benefit cap without requiring a maximum annual amount. Therefore, as long as the hospital has policies and procedures in place to insure that incidental benefits given to its medical staff do not exceed the per-benefit limit, no tracking of each incidental benefit is required.

Even though the non-monetary compensation exception does not require tracking, it is CMS’s assumption that hospitals are tracking all non-monetary compensation to insure that the aggregate amount of non-monetary compensation given to each physician is below the annual threshold. However, not all physicians must be tracked. And, in some instances, if
another Stark Law exception may be satisfied, then the benefit will not need to be tracked. Each situation requires careful examination.

For referring physicians employed by a hospital, many benefits offered in the employment relationship should fall under the employment exception of the Stark Law and would not need to be tracked at all. If an arrangement satisfies any exception under the Stark Law exceptions, it would not need to satisfy another exception. This means that employed physicians can be carved out of the annual tracking requirement as long as the benefit can be deemed to be an employment benefit. For example, if the chief executive officer of a hospital takes an employed physician out to dinner to discuss the employment relationship, the dinner, although it is a non-monetary benefit, can be considered to be an employment benefit, and thus it falls under the Stark Law employment exception. This means, in most instances, every non-monetary compensation given to non-employed physicians and other independent physicians who are members of an organized medical staff must be tracked.

To make matters more complicated, a number of examples that would otherwise be tracked for purposes of either the non-monetary compensation exception or the incidental medical staff benefits exception can be designed to satisfy one of the Stark Law’s other exceptions. For example, the exception for personal services and the fair market value (FMV) compensation exceptions are available in certain limited situations, as long as the arrangement is set out in writing and signed by the parties. A simple one-page personal services contract can be used if a physician is providing services (e.g., consultation services) and the benefit given by the hospital (e.g., a dinner at a local restaurant) does not exceed fair market value for the consulting services provided. Caution, however, that involvement of counsel is strongly advised before relying upon these exceptions.

Operationally, the best practice for compliance will require developing a spreadsheet or other formal tracking device that allows the hospital to divide benefits according to each referring physician who receives the benefit. The challenges are determining how to account for each benefit provided, how to allocate the value of each benefit to each applicable physician, and which Stark Law exception applies for each circumstance. How a hospital allocates the benefit may depend on whether it is analyzing the benefit prior to the giving of the benefit or whether the benefit was discovered after it was given. If the benefit is discovered after it is given, the hospital may realize that the annual limit may have been exceeded. In that instance, it may be possible to apply an aggressive allocation if a physician’s annual limit would be exceeded without an aggressive allocation.

The following real-life examples offer possible ways to account for and allocate the benefit including, in some cases, a conservative allocation methodology and in others, a more aggressive allocation methodology.

Non-monetary compensation exception

- **Five dozen cookies given to four physicians:** Divide the value of cookies by four and track ¼ of the total value of the benefit to each physician. The value of the cookies (based on the cost of the cookies at the local grocery store or another valuation method that establishes the fair market value of the cookies) should be tracked, even though the hospital may have baked the cookies at a substantially reduced cost.

- **$150 worth of flowers to a physician practice of two physicians:** Track $150 to each physician separately (i.e., do not divide the value, because gift is not divisible).

- **Two Super Bowl tickets given to a physician to be used by the physician and his/her spouse:** Track cost of both tickets to the
physician. The value noted on the ticket should be the amount tracked, even though the “street value” may exceed the amount printed on the ticket.

- **Round of golf to two physicians as part of a hospital’s $10,000 donation to a charity:** Track cost of golf course fees and cart fees to each physician. Because most of the $10,000 donated by the hospital was given for charitable purposes, only the cost or value of the course and cart fees needs to be applied to the participating physicians.

- **$50 gift certificate to a local mall, marked “Not redeemable for cash” to a local mall is given to each medical staff member:** Track $50 to each physician. It is important that gift certificates be noted that they are not redeemable for cash, because if they were redeemable for cash, they would be either cash or cash equivalents, which are not permitted under the non-monetary compensation exception.

- **Lunch valued at $100 given by hospital to a physician office practice (four physicians and ten support staff):** A conservative approach would be to divide the cost among the four physicians, allocating $25 to each physician. However, a more aggressive approach would be to divide it among the 14 participants and allocate \( \frac{1}{14} \) of the value to each person, especially if education was provided to the entire staff.

- **$150 steak house dinner for non-employed physician:** Track value of physician’s meal (unless another exception applies).

- **$200 honorarium to medical staff physician for giving continuing medical education presentation for hospital’s medical staff:** Track $200 to physician (unless another exception applies).

- **$150 iPod touch won by a non-employed physician in a raffle:** A conservative approach would be to track $150 to the winning physician. However, a more aggressive approach would be to divide the $150 by the number of participating physicians and track that amount to each participating physician, because each participating physician had an opportunity to win the raffle.

### Medical staff incidental benefits exception

- Listing of medical staff on hospital’s website, including hyperlinks to the medical staff’s website.
- Free meals to medical staff in hospital’s cafeteria.
- Free lab coats or scrubs to each medical staff physician for purposes of uniformity on hospital premises. (Using the medical staff incidental benefit exception is an aggressive position if the hospital believes that it can determine a per-use, daily rate and this rate is less than the per-benefit limit. A more conservative approach would be to include the value of the lab coat under the non-monetary compensation annual limit.)
- Food given to medical executive committee during meeting in hospital conference room.

### Personal service and management or fair market value exceptions

These exceptions should not be used without legal counsel review and advice:

- **$150 steak house dinner for non-employed physician:** Have the physician sign a personal services contract stating that the cost of the meal is compensation for the physician’s consultation services during the dinner. However, the compensation cannot exceed FMV for the length of time the physician provides the consultation services during the meal (e.g., if FMV for the physician’s consultation services is $150 per hour, then make sure the duration of the meal is at least an hour).

- **Use of medical staff funds to pay for dinner at a local restaurant for medical executive**
committee monthly meeting: Have the physicians sign a personal services contract for the consultation services. Otherwise, the cost of the dinner would have to be allocated to each participating physician under the non-monetary compensation annual limit.

- $2,000 travel and accommodations to a board retreat for non-employed physician board member and spouse: The “services” performed by the physician board member can be covered by the personal services contract. Otherwise, the value of the travel and accommodations would exceed the 2014 non-monetary compensation annual limit of $385.

- $200 honorarium to medical staff physician who gives a continuing medical education presentation for the hospital’s medical staff: Have the physician sign a personal services contract covering this presentation.

- $10,000 paid to medical staff president (or use FMV compensation exception): Have the medical staff president sign a personal services contract that covers these services.

- $2,000 for non-employed physician to attend out-of-state customer service training, paid by hospital: Determine FMV for the physician’s time while training out of state and the subsequent training the physician will pass on to the hospital staff and other physicians upon return. Include these amounts in a personal services contract. Even if the vendor provided the training for “free,” a written agreement covering this arrangement needs to occur, because the training isn't really free (it was built into the purchasing contract).

Stark Law not applicable

- $500 gold watch given to physician on the day of his retirement: Physician is no longer a referral source (but don’t give the gift prior to the day of his retirement).

- $1,000 donation to local charity in honor of a specific member of the medical staff.

- Referring and independent physician speaks at community health seminar sponsored by hospital, but hospital doesn’t pay the physician and the physician can promote his/her services: Don’t always use the highest referring physicians as speakers at events; cycle through available physicians to speak.

Responding to a violation

If a provider fails to satisfy the above exceptions for non-monetary compensation and the arrangement is covered by the Stark Law, the provider should consider self-disclosing under the Medicare Self-Referral Disclosure Protocol (SRDP), which offers a method for healthcare providers and suppliers to disclose actual or potential violations of the Stark Law. The SRDP is intended to facilitate the resolution of matters that, in the disclosing party’s reasonable assessment, are actual or potential violations of the Stark Law.

CMS has published a number of self-disclosures occurring under the SRDP, including disclosures for violation of the non-monetary compensation limit. In January 2012, CMS settled two violations under the SRDP by a hospital in California that disclosed it had violated the Stark Law by exceeding the calendar year non-monetary compensation limit for a physician. All violations disclosed were settled for $6,700. Also in January 2012, CMS settled two violations under the SRDP by a hospital in Georgia that disclosed it had violated the Stark Law by exceeding the calendar year non-monetary compensation limit for two physicians. All violations disclosed were settled for $4,500. In April 2012, CMS settled six violations under the SRDP by a hospital in North Carolina that disclosed it violated the Stark Law by exceeding the calendar year non-monetary compensation limit for two physicians during three consecutive years.
All violations disclosed were settled for $6,800.11. These settlements reflect how challenging monitoring non-monetary compensation is while remaining under the annual limit.

**Conclusion**

Navigating the non-monetary compensation given by hospitals to referring physicians requires a thoughtful and methodical approach. Hospitals are encouraged to develop internal mechanisms for identifying when non-monetary compensation is delivered to referring physicians, formally tracking the amount, and understanding when non-monetary compensation is inappropriate or exceeds the annual limits. If a violation is discovered, the provider should seek counsel and consider following the steps under the SRDP or make prompt repayment.

2. 42 C.F.R. Part 411, Subpart J.
4. See [http://go.cms.gov/1kWIW8s](http://go.cms.gov/1kWIW8s) for a list of annual limits.
5. See 42 C.F.R. § 411.357(m).
6. See [http://go.cms.gov/1kWIW8s](http://go.cms.gov/1kWIW8s) for a list of annual limits.
7. See 42 C.F.R. § 411.357(c).
8. See 42 C.F.R. § 411.357(d).
10. To obtain a complimentary template one-page Personal Services Contract to be used for this purpose, contact Bob Wade at bwade@kdlegal.com and request a copy.
11. CMS Physician Self Referral website. Available at [http://go.cms.gov/1chFdOm](http://go.cms.gov/1chFdOm) (Filter: 2012-01-05 and 2012-04-05)