



Kim Stanger

Partner
208.383.3913
Boise
kcstanger@hollandhart.com

Correcting Stark Violations: 90-Day Grace Period

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Physicians and entities to which physicians refer may violate the Ethics in Patient Referrals Act (“Stark”) by mistakenly overpaying or underpaying amounts due under a compensation arrangement. For example, a hospital may undercharge a physician for rent, or a referring physician may receive payments in excess of his or her contract with a hospital due to a bookkeeping error. Because Stark is a strict liability statute, even minor unintentional mistakes can result in major penalties. Fortunately, however, Stark establishes a grace period for parties to remedy overpayments and underpayments and avoid Stark penalties.

The Stark Problem.

Stark generally prohibits a physician from referring certain designated health services (DHS) payable by Medicare or Medicaid to an entity with which the physician has a financial relationship unless the transaction is structured to fit a relevant safe harbor. (42 USC § 1395nn; 42 CFR § 411.353(a)). Stark affects many common financial relationships between physicians and DHS providers, including contracts for services, leases, directorships, loans, purchases, etc. It applies to financial relationships between the physician and other entities billing for the physician's services, including hospitals, employers, and even their own group practices. Many of the common safe harbors applicable to such arrangements require that the compensation paid to or by the physician be set forth in a written agreement and represent fair market value. (See, e.g., 42 CFR § 411.357 (a), (b), and (d)). Problems may arise when the physician pays or is paid more or less than the contracted amount, either intentionally or by mistake. Such actions will almost certainly cause the arrangement to fall outside the applicable compensation safe harbors, thereby subjecting the parties to Stark penalties, including prohibitions on billing, repayments, civil monetary penalties, and potential False Claims Act Liability. (See 42 CFR § 411.353(b)-(d)).

The 90-Day Grace Period. Fortunately, in its 2021 Stark amendments, CMS created a 90-day grace period for correcting overpayment or underpayment situations if the following conditions are satisfied:

- (1) No later than 90 consecutive calendar days following the expiration or termination of a compensation arrangement, the entity and the physician (or immediate family member of a physician) that are parties to the compensation arrangement reconcile all

discrepancies in payments under the arrangement such that, following the reconciliation, the entire amount of remuneration for items or services has been paid as required under the terms and conditions of the arrangement;

(2) Except for the discrepancies in payments described in paragraph [1] of this section, the compensation arrangement fully complies with an applicable exception in this subpart.

(42 CFR § 411.353(h)). Timely payment reconciliations will avoid Stark liability.

Timely reconciliation is a key. Aside from the 90-day time limit, CMS warned that parties could not unreasonably delay reconciling known over- or underpayments without risking further Stark violations:

Although the new special rule for reconciling compensation at § 411.353(h) allows an entity to avoid violating the billing prohibition of the physician self-referral law if the parties reconcile all payment discrepancies under their arrangement within 90 consecutive calendar days following the expiration or termination of the arrangement, parties that fail to reconcile known payment discrepancies risk establishing a second financial relationship (for example, through the forgiveness of debt or the provision of an interest-free loan) that must satisfy the requirements of an applicable exception in order to avoid the prohibitions of the physician self-referral law. If the payment discrepancy or the failure to reconcile it (that is, recover excess compensation or collect compensation owed) is significant enough to give rise to a separate financial relationship, that financial relationship must satisfy the requirements of an applicable exception once it exists. The commencement date of the second financial relationship depends on the facts and circumstances, such as the amount of excess compensation or unpaid compensation and how long the known overpayment or underpayment of the

compensation has continued. For example, a large amount of excess compensation that is not recovered may give rise to a financial relationship in a shorter amount of time than a very small amount of unrecovered excess compensation or unpaid compensation. Thus, even if the entity is deemed not to have violated the physician self-referral law's billing prohibition once the original compensation arrangement is ultimately reconciled, the entity would be prohibited from submitting a claim or bill for a designated health service referred by the physician beginning at the point where the second financial relationship exists.

(85 FR 77584-85).

Conclusion. The 90-day grace period is an important way for physicians and DHS entities to cure certain Stark violations. Physicians and DHS providers should periodically review the compensation arrangement during the agreement term and upon termination of the arrangement to ensure compliance or timely reconciliation. If overpayments or underpayments are identified, the parties should take prompt steps to reconcile the payments and avoid Stark liability.

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