

## Part B Insider (Multispecialty) Coding Alert

### Compliance: CMS Allows Some Percentage Compensation Deals For Docs

#### New Stark II regulation loosens some of the payment rules

There's good news for doctors who want to do business with other related businesses without risking a major compliance headache or worse.

The **Centers for Medicare & Medicaid Services** finally issued the long awaited regulation implementing the Stark II self-referral law, named after anti-fraud crusader Rep. **Fortney "Pete" Stark** (D-CA). On a number of issues, CMS erred on the side of making your life a bit easier. The rule was published in the March 26, 2004 Federal Register.

The big controversy that held up this regulation was the definition of compensation that is "set in advance." The law had some exceptions to the self-referral bans as long as the compensation was "set in advance." In "Phase I," published Jan. 4, 2001, CMS interpreted this requirement as preventing most arrangements where the physician is paid on a percentage basis.

But in the new reg, CMS modified its approach to allow percentage compensation agreements as long as "the methodology for calculating the compensation is set in advance and does not change over the course of the arrangement in any manner that reflects the volume or value of referrals or other business generated by the referring physician."

Responding to comments, CMS protected "legitimate arrangements involving certain specialty groups that primarily furnish oncology and radiology services." In Phase I, CMS had imposed a "three-part test" to determine whether a physician had an indirect financial relationship with an outside entity: an "unbroken chain" of financial relationship with the entity, compensation that varies with the volume of referrals and the entities knowledge of these variations.

Commenters complained this test would make it hard for oncologists and radiologists to pursue legitimate arrangements, and CMS also decided the three-part test could facilitate some shady arrangements. So CMS replaced the three-part test with three new tests, one of which addresses any building where a physician's practice is normally open 35 hours per week and in which the physician regularly practices.

CMS says some of the doctor's services must be physician services that aren't related to the "distinct health services" (DHS) provided by the other entity, even if they lead to the provision of DHS. But test interpretations are generally considered DHS and won't count as unrelated services, CMS cautions.

#### More Stark Provisions

Among many other provisions, the new Stark II reg also expanded the Stark exception for providing "certain dialysis-related drugs" to include more drugs used in dialysis treatment. And it reinterprets several statutory exceptions, allowing space and equipment rentals, employment relationships, personal services arrangements and physician recruitment.