What new Stark rules mean for ORs

Your hospital wants to extend a courtesy discount to physicians for surgery. The CEO wants to pay surgeons to be on a value analysis committee. A surgeon wants to buy a laser and lease it back to the hospital.

Are these arrangements permitted under physician self-referral rules?

New rules for the Stark law spell out what the government considers appropriate. These Phase II regulations, effective July 24, carry out the Stark II law, effective in 1995. The Phase I rules were issued in 2001.

Some highlights of the complex rule were provided by Michelle Marsh, an attorney with Walter Lansden Dorch & Davis in Nashville, Tenn.

Why are the regs important?

“These rules clarify and tone down what could be a very broad prohibition on financial relationships under the Stark statute,” Marsh says.

The purpose of the Stark law is to discourage physicians from having financial relationships with hospitals and other entities to which they make referrals, with the aim of preventing abuse of taxpayer-funded programs such as Medicare and Medicaid.

In passing the law, the government also realized it needed to provide certain exceptions for arrangements that don’t pose a significant risk of abuse. Those exceptions are spelled out in the regulations.

Who is covered?

The Stark statute covers 11 designated health services, including inpatient and outpatient hospital services. The statute does not cover freestanding ambulatory surgery centers (ASCs) that are not a department of a hospital, providing the center only provides services paid for under the Medicare ASC fee schedule.

Can hospitals pay physicians for being involved in cost management projects?

The regs make it clear a hospital can contract with physicians for legitimate administrative services, Marsh notes. The regs also set up a “safe harbor” for determining “fair market value” for physician payment for these services. Fair market value is considered either:

• an average rate paid to emergency department physicians in the area
• an average hourly rate under 4 of 6 widely published physician compensation surveys. (The surveys are listed in the rules.)

The Stark II rules don’t address gainsharing arrangements, however. In gainsharing, a hospital might agree to split savings from a cost-reduction effort with physicians.

There has been some movement on gainsharing on other fronts. Several years ago, the Health and Human Ser-vices Office of Inspector General (OIG) took a strong stand against gainsharing. Since then, HHS has developed some pilot programs, but these are caught up in litigation. So at the moment, gainsharing is up in the air.

Per-click payments for equipment

The Stark rules allow a hospital to pay a physician a per-use rate for a piece of equipment that the physician owns and leases to the hospital.

The per-click rate must be set at fair market value, and the lease must meet other requirements spelled out in the regs. Generally, the lease has to be in writing signed by both parties, specify the equipment covered, cover equipment that doesn’t exceed what is necessary for the hospital’s business purposes—that is, isn’t just a way to funnel money to a doctor who is a referral source—and cover
equipment used exclusively by the hospital leasing the equipment.

Hospitals can feel pretty comfortable that they are paying fair market value if the per-click rate is comparable to what they would pay any other vendor for use of that equipment, says Marsh.

But it’s very important not to vary the fee according to the volume of referrals—in other words, you couldn’t pay a higher per-click rate to a high-volume surgeon than a low-volume surgeon.

**Courtesy discounts to physicians**

A new provision—the regs allow giving free or discounted health care to physicians, physician family members, or physicians’ office staff. The professional courtesy discount must:

- be offered to all physicians on the medical staff or in the community or service area without regard to the value or volume of their referrals—not only to high-volume admitters
- apply to services routinely offered
- be set forth in a written policy approved by the governing board in advance
- not be offered to a beneficiary of a federal health program, such as Medicare, unless there is a financial need
- include informing the patient’s insurer in writing if the copay or deductible is reduced.

Courtesy discounts must not violate the Antikickback Statute or any other federal or state law or regulation for billing or claims submission. (The Antikickback Statute is another federal law that prohibits inducements or rewards for physician referrals.)

It’s wise to have documentation to show the hospital is offering courtesy discounts broadly—not just because it wants one or a few physicians to bring more business.

**Linking information systems**

Also new—the regs allow hospitals to provide physicians with information technology (IT) services or items to encourage them to use electronic health records. Requirements are that the IT services:

- must be offered on a communitywide basis, not just to top admitters
- not violate the Antikickback Statute or any other federal or state law or regulation on billing and claims submission.

“The key is to have this be truly communitywide to defend against any charge that it was intended as a remuneration for referrals,” says Marsh.

*The Phase II Stark rules (42 CFR Parts 411 and 424) were in the March 26 Federal Register at www.gpoaccess.gov/fr/index.html*