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Compliance 101: Physical therapy, the referring physician and Stark regulations

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Physicians have long referred their patients for physical therapy services to community and hospital-based physical therapy and rehab departments. Many physician practices, particularly those that have the propensity to refer large volumes of patients for physical therapy in particular, have developed therapy services and clinics within their practice. Following the enactment of Stark I, many physician groups divested their therapy practices amid concerns of non-compliance with the self-referral law. The landscape of physician-owned physical therapy practices (POPTS) has been repopulated over the past decade as physician groups have taken advantage of the in-office ancillary exception available under the Stark II regulations. Physician groups tout the ability to closely supervise the therapy of their patients and concurrently develop another revenue stream from in-office ancillary services as the main advantages of offering therapy services.

The purpose of this article is to briefly highlight Stark compliance issues in the most common context of physical therapy referrals, and alert physician groups to those issues that may require further review in the context of referrals for therapy services, based on where the therapy is to be provided.

Defining physical therapy

According to the American Physical Therapy Association (APTA), physical therapists help people with orthopedic conditions such as low back pain or osteoporosis; joint and soft tissue injuries, such as fractures and dislocations; neurologic conditions, such as stroke, traumatic brain injury, or Parkinson's disease; connective tissue injuries, such as burns or wounds; cardiopulmonary and circulatory conditions, such as congestive heart failure and chronic obstructive pulmonary disease; and workplace injuries including repetitive stress disorders and sports injuries. A physical therapist (PT) examines the patient and develops a plan of care that promotes the ability to move, reduces pain, restores function, and prevents disability. Therapeutic exercise and functional training are the cornerstones of physical therapy treatment.

From a Medicare perspective, physical therapy services means those outpatient physical therapy services (including speech-language pathology services) described at section 1861(p) of the Social Security Act that are covered under Medicare Part A or Part B, regardless of who provides them, if the services include:

> (i) Assessments, function tests and measurements of strength, balance, endurance, range of motion, and activities of daily living; (ii) Therapeutic exercises, massage, and use of physical medicine modalities, assistive devices, and adaptive equipment; and/or (iii) Establishment of a maintenance therapy program for an individual whose restoration potential has been reached, although maintenance therapy itself is not covered as part of these services.

When a physician is contemplating a physical therapy referral for a patient, several therapy venues may be considered as referrals:

- A community private physical therapy practice or hospital-based outpatient therapy department;
- Therapy services provided in the physician office as part of the group practice; or
- A private practice therapist who in some cases may be renting office space that is located within the group practice's office. Many hybrid ownership arrangements exist, including physician ownership of a comprehensive outpatient rehabilitation facility (CORF) or rehab agency. Any such arrangement must not only comply with Stark and anti-kickback statutes, but must also comply with Medicare regulations (e.g., survey and certification) as well as any state regulatory requirements (e.g., building codes, certificate of need [CON], and facility licensure).

The Stark Law

Section 1877 of the Social Security Act , commonly known as the Stark Law or simply Stark, prohibits physicians from referring Medicare patients for certain designated health services (DHS) to an entity with which the physician or a member of the physician's immediate family has a financial relationship, unless an exception applies. Stark also prohibits an entity from presenting or causing to be presented a bill or claim to anyone for a DHS furnished as a result of a prohibited referral.

When Stark I was enacted in 1989, section 1877 applied only to physician referrals for clinical laboratory services. In 1993 and 1994, Congress expanded the prohibition to ten additional DHS and applied certain aspects of the law to the Medicaid program. Among the DHS services added in Stark II were physical

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therapy (including speech-language pathology) and occupational therapy.

Referrals to private practice and hospital outpatient departments

The majority of physicians refer patients for therapy services to private practice clinics or hospital outpatient departments. Some referrals may require a detailed look at the relationship between the referring physician and the therapy clinic, and inevitably, a legal review by an attorney who is a Stark expert to ensure that agreements are structured properly and that referrals clearly fall within a Stark exception. A few such arrangements are:

1) Instances where the referring physician refers to a hospital outpatient department with which he has a compensation arrangement in place (e.g., providing medical direction to the inpatient and outpatient rehabilitation programs;
2) Referral to a private practice where a family member is employed; or
3) Referral to a private practice where the physician's family member is the owner of the practice. Where relationships exist with family members, whether by employment or ownership, it is important to determine if remuneration is received under a Stark exception.

Referrals for in-office therapy services

Under the in-office ancillary services exception, a physician may refer Medicare patients for physical therapy services provided within the physician practice if several requirements are met. One requirement is that the therapy services must be performed in the same building in which at least one member of

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Therapy Venue	Condition	Risks
Hospital outpatient therapy department	Physician on hospital staff, refers to outpatient department, no financial relationship with hospital or therapy department.	No apparent Stark risks
	Physician is Medical Director of hospital inpatient rehab facility, and outpatient rehab services, and receives Medical Director compensation.	Potential Stark violation: Review compensation arrangements
Private practice physical therapy clinic	Physician refers based on patient preference, no financial relationship with the private practice clinic or staff.	No apparent Stark risks
	Physician refers to a clinic where a family member is a receptionist	Potential Stark violation: financial relationship of family member in the private practice clinic. Review for bona fide employment relationship.
	Physician refers to a clinic which is wholly owned by the physician's spouse.	Stark violation: financial/family relationship
In office therapy services	Physician refers to therapy clinic that is physically located within and a part of the group practice	Potential Stark violation: Review for compliance with in-office ancillary exception
	Physician personally provides physical therapy services to patient	No apparent Stark violation, personally performed services are not 'referral'
	Physician refers to therapy clinic that is within the office suite, therapy is provided by an athletic trainer under the direct supervision of the physician	No apparent Stark violation if in compliance with in-office ancillary exception; (however therapy provided by athletic trainers, does not meet the Medicare definition of physical therapy provided incident-to.)
	Physician refers arthritis patients to in-office physical therapist for a pool therapy program that is held at community pool 3 miles from the clinic	Potential Stark issue: Review space lease. Potential Anti-Kickback violation: building location where services are provided. Potential violation: Medicare therapy regulations regarding non-exclusive use of community pools
Private practice therapists renting space in referring physician office suite	Physician refers to physical therapist who rents space in the physician office suite. The therapist is available 2 half-days per week in the office suite.	Potential Anti-kick-back violation. Review OIG Fraud Alert: Rental of Space in Physician Offices by Persons or Entities to Which Physicians Refer. (Feb 2000)

the physician group practice has a practice or services must be performed in a location that is used for the centralized provision of the therapy services. The definition of "same building," is met if it satisfies one of three tests comprised of elements related to the number of hours the office is open, the number of hours physician services unrelated to DHS are provided, and the presence of the referring physician. The practice must also meet the Stark definition of a "group practice."

Services provided in physicians office

Requirements for participation in the Medicare program must also be met, and the requirements are essentially the same as other providers of therapy services appropriate to the venue (private practice vs. CORF, for example). In a report issued in 2006, the OIG reported that 91% of physical therapy billed by physicians and allowed by Medicare during the first 6 months of 2002 did not meet program requirements, resulting in $136 million in improper payments. (Source: http://www.oig.hhs.gov/oei/reports/oei-09-02-00200.pdf)

Detailed therapy requirements are easily accessed in the Medicare Benefits Policy Manual, Chapter 15, sections 220 and 230. Most carriers have published local coverage determinations that detail documentation and coding requirements, and definitions of qualified personnel. The CMS Website also contains a section on therapy services: http://www.cms.hhs.gov/TherapyServices/.

Therapy "caps" (BBA, 1997) also apply including a cap of $ 1,810 on physical therapy services (including speech-language-pathology) for 2008. At press time, an extension to the therapy caps exceptions process which had been in place for 2006-2007 had not been put in place. There is also a separate $1,810 cap on occupational therapy services in 2008.

In certain states, such as South Carolina, there is a prohibition against a physical therapist working as an employee of a physician, when the physician refers patients to the physical therapist. State practice acts for physical therapy can be referenced online at http://www.fsbpt.org.

PT renting space from the referring physician

Various types of creative arrangements have popped up related to rental of office space to outside parties who provide therapy services to patients who are referred by the physician who owns the space. A simple and common arrangement involves renting of space (and in some instances, therapy equipment) to a private practice therapist to whom the physician refers. In addition to rental arrangements pertinent under Stark, the OIG issued a special fraud alert in 2000 regarding rental arrangements, specifically noting physical therapy services, warning against rental fees far in excess of fair market value, and in reality serving as disguised kickbacks for referrals. This fraud alert "Rental of Space in Physician Offices by Persons or Entities to Which Physicians Refer" cautions parties in this type of instance to avail themselves of the rental of space and/or equipment safe harbors under the Anti-kickback Statute, which in all cases requires that payments represent fair market value.

Other more complicated rental arrangements exist, and all arrangements should be reviewed by a health care lawyer who is an expert in the Stark Law and Anti-kickback Statute.

2007 Updates

CMS issued the Stark II, Phase III regulations on September 5, 2007. The Phase III regulations, which became effective on December 4, 2007, clarify several Stark Law definitions and provide additional guidance on various "exceptions" used by physicians to permit referral relationships that are otherwise prohibited.

In the Proposed Rule, CMS notes its concern that the in-office ancillary services exception has been improperly used by physician practices to provide DHS that are not sufficiently connected to the physician practice. CMS did not propose any changes to the exception in the Proposed Rule, despite noting that it received hundreds of comments from physical and occupational therapists during Phase II stating that the in-office ancillary services exception encourages physicians to create physical and occupational therapy practices.

However, CMS did solicit comments on:

1) whether certain services should not qualify for the exception (e.g., any therapy services that are not provided on an "incident-to" basis, and services that are not needed at the time of the office visit in order to assist the physician in his/her diagnosis or plan of treatment);
2) whether changes should be made to the definition of "same building" and "centralized building," which are terms used in the exception to define the site of service for the DHS;
3) whether non-specialist physicians should be able to use the exception to refer patients for specialized services involving equipment owned by the non-specialists; and
4) any other restrictions on the ownership or investment in services that would curtail program or patient abuse.

The Phase III regulations clarify that productivity bonuses can be based directly on "incident to" services that are incidental to the physician's personally performed services, even if they are DHS services. This means that a physician can be paid a productivity bonus based directly upon physical therapy

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continue to receive an applicable percentage of outpatient reimbursement under the Deficit Reduction Act of 2005, and rural sole community hospitals (SCHs) along with essential access community hospitals (EACHs), will continue to receive 7.1% payment increase in 2008. And yes, the Inpatient-Only list (SI C) is alive and well for 2008!

Be prepared to react as CMS will publish further coding and billing instructions at a later date. Working as a team to implement, update, and manage the comprehensive 2008 OPPS and CPT updates will ensure your outpatient revenue cycle is "APC-ready", compliant, and financially sound. ■

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HealthSouth and Physicians Pay $14.9 Million, Resolve Health Care Fraud Charges

On December 14, 2007, the U.S. Department of Justice announced that HealthSouth Corporation and two physicians have agreed to pay the United States a total of $14.9 million to settle allegations that the Birmingham, Ala.-based company submitted false claims to the government and paid illegal kickbacks to physicians who referred patients for care in some of its hospitals, outpatient rehabilitation clinics, and ambulatory surgery centers. For more: *http://www.usdoj.gov/opa/pr/2007/December/07_civ_1007.html*

HealthSouth Settlement Agreement: *http://www.usdoj.gov/usao/aln/Docs/December%202007/HealthSouth%20Settlement%20Agreement%20Fully%20Executed.pdf* ■

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services that are provided as incident to the physician's services.

If you have decided that providing physical therapy or occupational therapy in your office is the right step for your practice, consult with a health care attorney in your state who is knowledgeable in both the Stark Law and Anti-kickback Statute, as well as any state-specific requirements. You should ask for a review, not only of pertinent federal and state regulations governing self-referrals, but for any prohibitions on hiring therapists in your state as well. ■

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