



Alerts

New Stark Regulations Further Clarify Definitions of Fair Market Value and General Market Value

December 14, 2020
Health Care Alert

The Department of Health and Human Services (HHS), on November 20, 2020, released final rules for the federal physician self-referral law (Stark) and the anti-kickback statute (AKS). The Centers for Medicare & Medicaid Services (CMS) and the Office of the Inspector General (OIG) worked together to finalize proposed protections for value-based arrangements and clarify existing Stark and AKS requirements to facilitate coordinated, value-based care, and cure undue confusion and burdens. Most changes will be effective on January 19, 2021. Here, we outline changes to the definitions of "fair market value" and "general market value" under the new Stark regulations.

CMS altered the definitions of "fair market value" and "general market value" to better reflect how they are defined in the statute. They also sought to provide additional specificity based on the type of the financial arrangement being valued for "fair market value," and specificity for the transactions contemplated in the Stark law exceptions.

CMS removed "general market value" from the definition of "fair market value" at [42 C.F.R. §411.351](#). In addition, CMS removed the "volume or value" and the "other business generated" standards from the definition of "fair market value." Now, CMS considers the "volume or value" and the "other business generated" standards as separate and distinct requirements from the "fair market value" requirement. As a result, where these requirements appear for exceptions, compensation must be (1) fair market value for items or services provided; and (2) not take into account the volume or value of referrals—or the volume or value of other business generated by the physician, where such standard appears. CMS also removed the "volume or value" standard from the definition of "general market value" to maintain consistency with this new interpretation.

Modified definitions of "fair market value" now exist for specific applications as well. This structure enhances clarity, but does not significantly differ from the statutory language at section 1877(h)(3) of the Stark Law.

- First, there is a definition of general application of "fair market value," which now means "the value in an arm's-length transaction, consistent with the general market value of the subject transaction."
- Second, there is a definition applicable to the rental of equipment of "fair market value," which "means the value in an arm's-length transaction of rental property for general commercial purposes (not taking into account its intended use), consistent with the general market value of the subject transaction."
- Third, there is a definition applicable to the rental of office space "fair market value," which "means the value in an arm's length transaction of rental property for general commercial purposes (not taking into account its intended use), without adjustment to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor where the lessor is a potential source of patient referrals to the lessee, and consistent with the general market value of the subject transaction."

CMS restructured the "general market value" definition to emphasize their policy that the valuation of the remuneration terms of a transaction should not include any consideration of other business the actual parties to the transaction may have with one another. Additionally, modified definitions now exist for the transactions contemplated in the Stark law exceptions.



- First, for asset acquisitions, the "general market value" is "the price that an asset would bring on the date of acquisition of the asset as the result of bona fide bargaining between a well-informed buyer and seller that are not otherwise in a position to generate business for each other." CMS continues to believe that the general market value of a transaction is based solely on consideration of the economics of the subject transaction and should not include any consideration of other business the parties may have with one another. This final definition retains the essentially equivalent requirement for bona fide bargaining between well-informed parties that are not otherwise in a position to generate business for each other.
- Second, for compensation for services, the "general market value" is "the compensation that would be paid at the time the parties enter into the service arrangement as the result of bona fide bargaining between well-informed parties that are not otherwise in a position to generate business for each other." CMS continues to believe that precluding reliance on comparables that involve entities and physicians in a position to refer or generate business for each other in the determination of both fair market value and general market value is an important program integrity safeguard and therefore finalized a definition of "general market value" that retains this language from the current regulation. CMS also clarifies in its guidance that the value of a physician's services should be the same regardless of the identity of the purchaser of those services. Accordingly, the physician's services are valued the same, whether the purchaser is a hospital that can bill for the designated health services referred by the physician under the Outpatient Prospective Payment System (OPPS) or a physician practice owned by a private equity investor or other physicians who have to bill under the Physician Fee Schedule (PFS), which may have lower payment rates. In addition, notably, CMS clarified that consulting salary schedules is an appropriate *starting point* in determining fair market value, but circumstances may warrant compensation varying from the salary schedule, including supply and demand, a physician's skill set, geographic location, and the like. Each compensation arrangement is different and must be evaluated based on its unique factors. However, CMS also explained that common arrangements, where the services required are identical regardless of the physician identity providing them, are more easily evaluated based on salary surveys for determining compensation that is fair market value. CMS declined to establish rebuttable presumptions or "safe harbors" that would deem compensation to be fair market value if certain conditions are met.
- Third, for rental of equipment or office space, the "general market value" is "the price that rental property would bring at the time the parties enter into the rental arrangement as the result of bona fide bargaining between a well-informed lessor and lessee that are not otherwise in a position to generate business for each other." They are removing from §411.351 the statement that, for purposes of the definition of "fair market value," a rental payment does not take into account intended use if it takes into account costs incurred by the lessor in developing or upgrading the property or maintaining the property or its improvements.

CMS will continue to accept any valuation method that is commercially reasonable and provides them with evidence that the compensation is comparable to what is ordinarily paid for an item or service in the location at issue, by parties in arm's-length transactions that are not in a position to refer to one another (66 FR 944). They will continue to consider a range of methods of determining fair market value and that the appropriate method will depend on the nature of the transaction, its location, and other factors (69 FR 16107 and 72 FR 51015 through 51016).