

## Client Alert

### Stark Law "Set In Advance" Rule Definition Delayed

**December 15, 2001**

The Centers for Medicare and Medicaid Services, DHHS ("CMS") has delayed for one year (until January 6, 2003) the effective date of the Stark law exception definition for compensation "set in advance" appearing in § 411.354(d)(1). 66 Fed. Reg. 60154 (Dec. 3, 2001). The delay will permit CMS to reconsider its previous determination that "percentage compensation" arrangements do not meet the "set in advance" requirement.

CMS has received numerous comments stating that percentage compensation arrangements with physicians are routinely utilized and, in many instances, benign relationships that should be able to qualify under Stark exceptions that include the "set in advance" requirement. Commenters also pointed out that CMS's position on percentage compensation arrangements was inconsistent with its general relaxation of the agency's "set in advance" interpretation in the January 4, 2001 Final Rule, which permits "per use" arrangements to qualify for a Stark exception even when the actual aggregate payment amount in these relationships were also not calculable "in advance."

Postponing imposition of this component of the "set in advance" definition for one year, CMS acknowledged the hardship to be placed on providers and physicians (and, ultimately, the Medicare program and its beneficiaries) if numerous percentage-based physician compensation arrangements needed to be renegotiated and revised in the next thirty days.

All other criteria required to meet a particular Stark exception remain in place and must be met. For example, compensation arrangements must continue to be based upon "fair market value," and not take into account the "volume or value of referrals," where these criteria must be met to fit within a particular exception.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.