

**STARK LAW
NON-MONETARY COMPENSATION
AND
MEDICAL STAFF INCIDENTAL EXCEPTIONS
April 6, 2011**

Anything of value provided by a hospital to a physician, regardless of how small (e.g., coffee mugs, notepads, flower baskets) creates a financial relationship between the physician and hospital. In the absence of a Stark exception, the physician may not refer Medicare patients to that hospital, and the hospital may not bill for any hospital inpatient or outpatient services, or certain other "designated health services" furnished to such patients, without violating the Stark Law.

Two exceptions that can be used for gifts or other items provided by a hospital to an independent physician apply to (1) nonmonetary compensation ("NMC"), and (2) medical staff incidental benefits ("MSI"). The NMC and the MSI exceptions have numerous requirements that must be satisfied. Among other requirements, for NMC the total annual compensation cannot exceed \$359 for 2011. For the MSI exception, the compensation per benefit cannot exceed \$30.

Non-Monetary Compensation includes, but is not limited to, the following items:

- Flowers
- Gifts baskets
- Thank you gifts, service appreciation gifts, welcome gifts, and sympathy gifts
- Meals
- Holiday gifts (e.g., turkeys and pies)
- Cookie trays
- T-shirts and coffee mugs
- Tickets to concerts or sporting events
- Staff events (e.g., picnics, golf tournaments)
- Some CME seminars

The requirements of the NMC exception are summarized below.

	The Non-Monetary Compensation Exception applies to compensation that meets the following requirements. The compensation is:
1	In the form of items or services (i.e., not cash or cash equivalent);
2	Does not exceed an aggregate of \$359 per calendar year (for 2011);
3	Not determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician;
4	Not solicited by the physician or the physician's practice (including employees and staff members);
5	The compensation arrangement does not violate the anti-kickback statute.

Medical Staff Incidental Benefits include, but are not limited to, the following items:

- Computer/internet access provided in the hospital
- Lab coat worn on campus
- Modest meals provided during a medical staff committee meeting
- Refreshments provided in the physician's lounge
- Parking in the hospital garage or lot
- Identification of physicians on hospital website or in hospital advertisements***
- One local medical staff appreciation event per calendar year for the entire medical staff (e.g., a holiday party), provided the entity has a formal medical staff. Any gifts or gratuities provided in connection with the medical staff appreciation event are subject to the NMC amount and must be tracked and logged

*** Additional requirements will apply to any marketing/ advertising involving physicians. Any such advertising must either be treated as NMC, or MSI, or the physician must enter into a written agreement and pay fair market value for the advertising.

The MSI Exception to the Stark Law permits hospitals to "identify" physicians on the hospital's website, or medical staff directory, or to a limited extent, in hospital advertising. The hospital may include limited information on the website, medical staff directory, or in advertising. The information may include (i) physician specialty, (ii) office address, (iii) telephone number, (iv) office hours, (v) insurance accepted, and (vi) languages spoken. Providing any additional information might be seen as impermissible advertising and promoting of the physicians' private practice in a manner that is outside of the MSI exception. *Please discuss any advertising with legal counsel before proceeding.*

The requirements of the MSI exception are summarized below. Any advertising that will be treated as MSI must comply with the following requirements.

	The Medical Staff Incidental Benefits Exception applies to compensation that meets the following seven (7) requirements. The compensation is:
1	In the form of items or services (i.e., not cash or cash equivalent);
2	Offered to all members of the medical staff practicing in the same specialty;
3	Used on campus (however, identification of the medical staff on a hospital website or in hospital advertising meets the "on campus" requirement of the exception);
4	Only offered while the physician is engaged in activities that benefit the hospital or its patients (except for identification on website or in advertising);
5	Reasonably related to delivery of medical services at the hospital;
6	Of low value with respect to each occurrence of the benefit (2011 limit is \$30 per occurrence); and
7	Provided without regard to and not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties and does not violate the anti-kickback statute.

Frequently Asked Questions

1. **Question (Holiday Gifts)** → Hospital provides a gift basket during the holidays to its Chief Medical Officer who is employed by the hospital. Will the value of the gift basket need to be counted against the CMO's annual NMC limit?

Answer → No. So long as the physician is an employee of the hospital that is providing the NMC, the hospital will not be required to count the value of the gift basket against that physician's annual NMC limit. The hospital will only be required to track NMC provided to independent physicians.

2. **Question (Event Tickets)** → Hospital purchases season tickets, at a discount, to all shows at the ABC Theater and distributes a pair of tickets to various physicians on the medical staff throughout the year as a token of the hospital's appreciation. Does this qualify as NMC? If so, how would the hospital determine the value that should be tracked on the NMC log?

Answer → Tickets to concerts, theater productions, sporting and charity events are all examples of NMC items that require tracking. The key to determining the value of a NMC item/service to a physician is determining the "fair market value" of the item/service. Under Stark, the fair market value means the value in an arm's length transaction between a willing buyer and seller, without regard to referrals. Cost can be a good indicator of the FMV. If the hospital buys a ticket for \$50, then that is good evidence that the FMV is \$50. The cost of a meal will almost certainly be the value of the meal. However, some judgment must be applied because cost may not always reflect FMV. Questions regarding FMV should be directed to legal counsel.

3. **Question (Services)** → At the request of Dr. Jones, the hospital provides instrument cleaning and sterilization services at no charge to the physician's group practice. Dr. Jones is an independent physician in the community. Does this qualify as NMC or Medical Staff Incidental Benefits? Can the Hospital provide this service free of charge to the physician?

Answer → If the physician group does not receive these services from the hospital, the practice would otherwise have to pay for sterilization equipment or for a third party vendor to provide the services. Therefore, the hospital is providing something of value to the physician group. Additionally, these services do not fall within the Stark exception for Medical Staff Incidental Benefits for several reasons, including, the services were solicited by Dr. Jones, the services are not offered to all members of the Medical Staff, and the instruments are not being utilized on the hospital's campus. These services also do not fall within the Stark exception for NMC, because such services can only be provided to an individual physician and not to a medical group or practice. The hospital would have to determine a fair market value rate to charge the physician practice for these services and enter into a written agreement accordingly.

4. **Question (CME)** → Hospital will provide 2 CME credits and lunch to all physicians on Hospital's medical staff who participate in certain CME training on campus. Who is primarily benefiting from the CME training - the hospital and the physicians or the hospital's patients? Would these CME credits constitute remuneration and be subject to the NMC or Medical Staff Incidental Benefits exceptions?

Answer → The training is for the benefit of the hospital, not the patients, and the CME credit is a benefit to the physicians. Generally, the Hospital would need to capture the provision of such CME under the NMC or MSI exceptions.

The value of the lunch and CME may qualify as a MSI benefit, so long as all the elements of the MSI exception are satisfied. The requirements that may be difficult to satisfy are whether attendance at the CME training was offered to all members of the medical staff practicing in the same specialty and whether the value of each occurrence of the benefit is less than \$30.

If the MSI exception is not available, then the value of the CME credit and the lunch could be tracked as NMC.

5. **Question (Advertising)** → Hospital develops and pays for the publishing of an advertisement announcing Dr. Jones is accepting new patients. Dr. Jones is an independent primary care physician in the community and on hospital's medical staff. The advertisement includes a headshot of Dr. Jones and her private practice contact information. Can the hospital pay for this advertisement on behalf of Dr. Jones?

Answer → The answer to whether a hospital can provide or pay for advertising under Stark will depend on the facts, and legal counsel should be consulted. If the focus of the advertisement is to promote the physician providing care through his/her private practice, not the hospital, and then the hospital cannot pay for the advertisement.

The value of such an advertisement should be tracked as NMC, or the physician should pay the hospital FMV for the advertisement pursuant to a FMV letter, or other written agreement.

6. **Question (Advertising)** → Hospital develops and pays for the publishing of an advertisement announcing Dr. Jones as a new physician on the hospital's medical staff. The advertisement includes a headshot of Dr. Jones, her specialty and contact information. The hospital always runs an announcement advertisement when a physician joins the medical staff. Can the hospital pay for this advertisement on behalf of Dr. Jones?

Answer → The answer to whether a hospital can provide or pay for advertising under Stark will depend on the facts and legal counsel should be consulted. Based on the facts presented, it is likely the MSI exception under Stark will allow the public identification of a new physician, including (i) name, (ii) specialty and (iii) pertinent qualifications. A notice of this type must be offered to all physicians who are new to the medical staff. The MSI exception requires that the compensation is offered to all physicians. It is a reasonable interpretation of Stark to conclude that publishing news of a new physician, when such is offered to all new physicians, will satisfy this Stark requirement. We do not have definitive guidance, but it is a reasonable interpretation of Stark that such information may be presented for new members of the medical staff via hospital print, billboard, radio, or television advertisements that focus on promoting hospital's service lines are permitted under the MSI exception.

The value of advertising may not exceed \$30. If it does, then the MSI exception will not apply. If the value of the advertising exceeds the \$30 limit in the MSI exception, then the benefit may be tracked as NMC, so long as all the elements of the NMC exception are satisfied.

7. **Question (Social Events)** → Hospital is hosting a wine tasting at a local restaurant for all physicians on the Hospital's medical staff. The Hospital is paying for the event. Will the value of this event need to be tracked as NMC? Would this event be subject to a FMV Letter?

Answer → If the wine tasting is a "social" event, then the hospital hosting (e.g., paying for) the event must track the value that is provided to each physician in attendance as NMC. However, the

hospital may hold one annual local social event for the entire medical staff (e.g., a holiday party), provided the hospital has a formal medical staff. If the hosting hospital wants to treat the wine tasting as its annual local social event, then the hosting hospital does not have to track the value of the event for the physicians on its medical staff as NMC. However, the hosting hospital would have to track the value of the event for those physicians in attendance who are not on the hosting hospital's medical staff. The value of any gifts or gratuities provided in connection with the medical staff appreciation event to any physician in attendance must be tracked and logged as NMC.

If the wine tasting is a "business" event, then the hospital may enter into a FMV Letter with each physician in attendance. In order for a FMV Letter to be valid, each physician must confer a benefit on the hosting hospital. In other words, the hosting hospital provides the value of the event (e.g., the meal) to each physician in exchange for a service the physician provides to the hosting hospital (e.g., prior to the wine tasting, the hosting hospital provides an educational session regarding charting practices).

8. **Question (Chamber of Commerce)** → Hospital has paid for a corporate membership to the local Chamber of Commerce. The hospital invites independent physicians in the community to attend Chamber events as a guest of the hospital. Does the hospital have to track the benefit of the meal received by the physician at the Chamber event?

Answer → If the physician's attendance at a Chamber event results in a benefit to the hospital (e.g., the physician serves as an ambassador for the hospital with local business leaders), it would be appropriate to capture the value of the event in a FMV Letter. If a FMV Letter is not appropriate, the hospital should track the value of any NMC provided to physician as a result of his or her attendance at the Chamber event (e.g., meal, gift).

9. **Question (FMV Letter)** → Hospital hosts a dinner meeting on-campus for certain physicians on hospital's medical staff to discuss improvements for anesthesia/ surgical services at the hospital. All of the physicians NOT employed by the hospital are asked to sign a FMV Letter prior to the meeting. Dr. Jones arrives late to the meeting and forgets to sign the FMV Letter until the following day. Is the value of the meal for Dr. Jones still covered under the FMV Letter even though she signed the Letter after the meeting? If not, is there alternative option for tracking this benefit?

Answer → One option is to use a FMV Letter for the value of the dinner meeting, so long as: (i) she signs the letter within thirty (30) days of the dinner, as is permitted by the Special Rule for Certain Arrangements Involving Temporary Noncompliance with Signature Requirements; and (ii) the hospital does not utilize the same exception with respect to Dr. Jones during the course of the next three (3) years. Another option may be to track the benefit as MSI. The value of the dinner may be considered a MSI, so long as all the elements of the MSI exception are satisfied, including that attendance at the meeting was offered to all members of the medical staff practicing in the same specialty (e.g., anesthesiologists and/or general surgeons).

A third option is to treat the value of the dinner meeting as NMC.