E-Briefings

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Welcome to The Governance Institute's E-Briefings!

This newsletter is designed to inform you about new research and expert opinions in the area of hospital and health system governance, as well as to update you on services and events at The Governance Institute. Please note that you are receiving this newsletter because you are a Governance Institute member or expressed interest at one of our conferences.

In this issue:

Hospitals without Physicians on the Board Deliver Lower Quality of Care

By Ge Bai, Ph.D., CPA, Washington and Lee University, and Ranjani Krishnan, Ph.D., Michigan State University

In today's rapidly evolving healthcare environment, hospitals face increasing pressure to improve quality of care. The board of directors is legally accountable for hospital quality of care and plays a critical role in overseeing and improving quality. The board can positively influence quality of care by making quality management a top priority, facilitating the development of a supportive culture for quality improvement, and assisting the promotion of quality values and quality improvement techniques.

Because of their expertise in medicine and their clinical training and experience, physicians thoroughly understand the importance of quality and the process of collecting and using quality data. Their involvement in governance, therefore, is likely to increase the board's emphasis on care quality, enhance the effectiveness of quality oversight, and thus improve quality outcomes. In an article recently published in the *American Journal of Medical Quality*,[1] we examined quality of care for hospitals with physicians on their boards compared to hospitals without physicians on the board.

The authors took advantage of the recent availability of hospital quality of care data from the Hospital Quality Alliance (HQA). Hospitals report to HQA a set of *process* quality scores, with each score indicating the percentage of patients for which the hospital fulfilled a desirable clinical action. The lowest possible score is 0 percent, reflecting a complete failure to follow the indicated action. The highest possible measure is 100 percent, reflecting full compliance. A hospital's quality measure for a certain category is the average of the hospital's scores for all actions related to that category. For example, a quality measure of 85 percent for heart attack means that the hospital carried out the complete set of indicated actions for 85 percent of patients who had a heart attack. The authors merged this dataset for the years 2004–2008 with California non-profit hospitals' disclosure reports, which have information regarding individual board members' occupations. (The authors also used The Governance Institute's 2011 biennial survey data to provide evidence on physicians' presence on boards in general.)

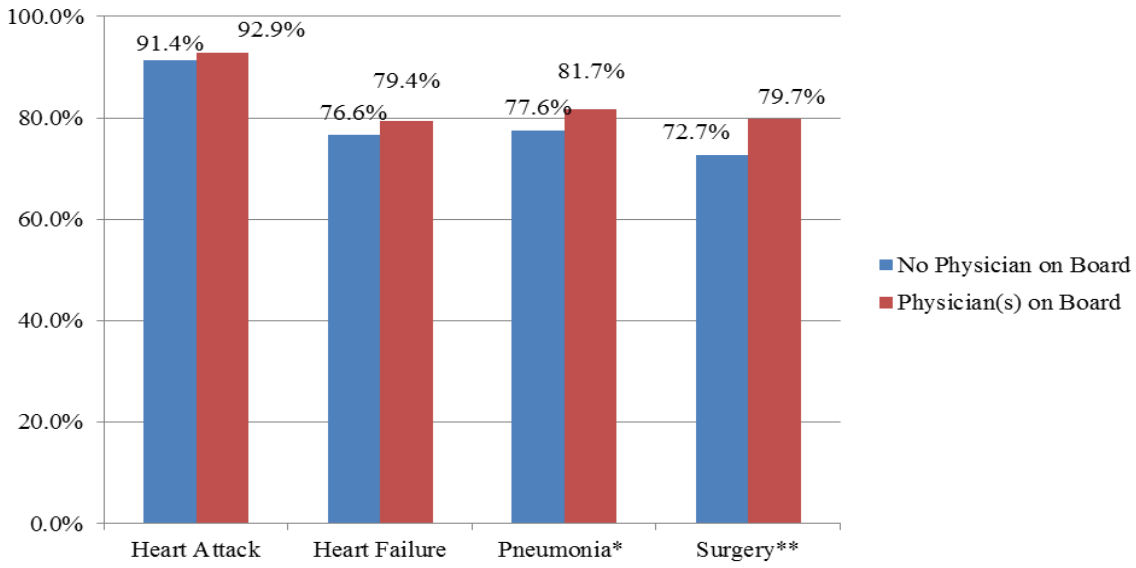
The authors compared the average quality of care between hospitals with physician directors and hospitals without physician directors and found that between-group differences in quality of care are statistically significant for pneumonia and surgery

[1] Ge Bai, Ph.D., CPA, and Ranjani Krishnan, Ph.D., "Do Hospitals without Physicians on the Board Deliver Lower Quality of Care?" *American Journal of Medical Quality,* January 10, 2014.

infection prevention, as shown in **Exhibit 1**. Furthermore, they used regression analysis to estimate a statistical model and found that an absence of physicians on the board is associated with 4.3 percentage points lower quality for heart failure, 3.1 percentage points lower quality for pneumonia, and 5.6 percentage points lower quality for surgery infection prevention.

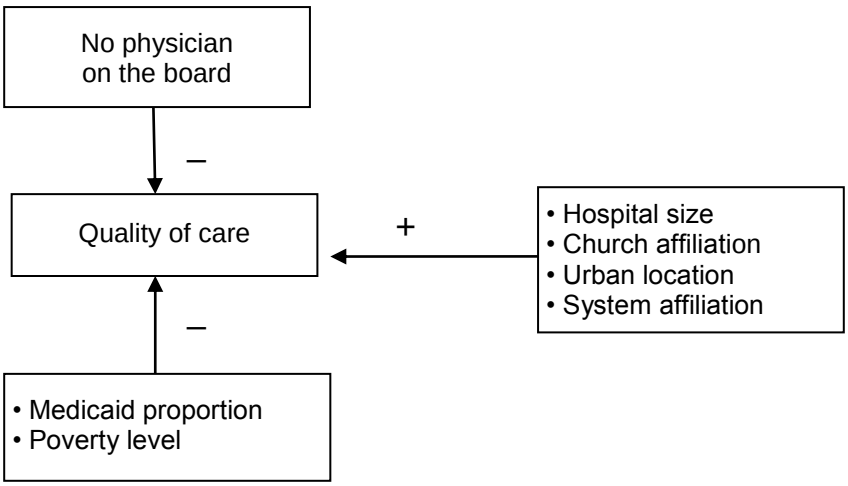
The authors found that some hospital characteristics also impacted quality of care. Large hospitals, urban hospitals, church-affiliated hospitals, and hospitals within a health system have higher quality outcomes while hospitals located in poorer countries and those with a higher proportion of Medicaid patients have lower quality outcomes. These results indicate that quality requires investment of resources, which could be problematic in resource-constrained hospitals. **Exhibit 2** summarizes these results (it is important to note that these characteristics are correlations only; the data does not show causation).

Exhibit 1: Comparison of Quality of Care between Two Groups of Hospitals



Notes: * $p < 0.05$; ** $p < 0.01$, based on mean comparison t-test.

Exhibit 2: Summary of Results



This study highlights the importance of physician participation in hospital governance and indicates priority areas for hospitals and policymakers to enhance medical quality outcomes. It is particularly timely as the federal government is imposing stringent regulatory requirements to strengthen board governance. Since 2008 the IRS has been requiring non-profit organizations to disclose detailed information on board composition and compensation. Thus, there is a growing recognition that board oversight can influence whether organizational missions can be carried out effectively and efficiently. In an effort to enhance the quality of board monitoring of financial reporting, since 2003 the U.S. Securities and Exchange Commission (SEC) has been requiring publicly traded companies to disclose whether they have at least one "audit committee financial expert" on their boards and the reason if a company has no such expert. The assumption is that these professionals better understand internal control processes related to financial reporting. In the same spirit, since physicians thoroughly understand the process of providing healthcare, policymakers would be advised to recommend that hospitals have at least one physician serve on their boards to ensure quality of care.

The Governance Institute thanks professors Ge Bai, Ph.D., CPA, Williams School of Commerce, Economics, and Politics, Washington and Lee University, and Ranjani Krishnan, Ph.D., Department of Accounting and Information Systems, Broad College of Business, Michigan State University, for contributing this article. They can be reached at baig@wlu.edu and krishnan@broad.msu.edu.

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Terms of Engagement: Board Oversight of Executive Development

This is the second article in a series examining governance tasks that may now require a heightened level of attentiveness.

By Michael W. Peregrine, McDermott Will & Emery, LLC

Several new and important corporate governance surveys combine to strongly suggest greater attention be paid to critical executive personnel issues by the hospital and health system board. These surveys identify matters of executive succession, search, and development as three areas that should draw increasing board-level attention. While these issues have in the past often been considered more administrative matters to be addressed by the hospital or health system's senior human resources officer, the survey results challenge that practice. Indeed, the survey results should serve as a "prompt" for thoughtful board-level discussion on the time spent by the board on these issues, and the process (e.g., board committee) by which such issues are addressed.

The new surveys are the work product of highly reputable governance-oriented organizations. They include the *2013–2014 NACD Nonprofit Governance Survey* from the National Association of Corporate Directors (NACD Survey);[2] the *2014 Report on Senior Executive Succession Planning and Talent Development* from the Institute of Executive Development (IED) and the Rock Center for Corporate Governance of the Graduate School of Business at Stanford University (Rock Center Report); [3] and *How Well Do Corporate Directors Know Senior Management?* from The Conference Board, in consultation with IED and the Rock Center (Conference Board Report).[4] Given the prominence of these organizations, their work product should have immediate, significant credibility within hospital and health system boardrooms.

The NACD Survey is notable because it focuses solely on non-profit corporations. It presents findings from its annual questionnaire, which was

[2] *2013–2014 NACD Nonprofit Governance Survey*, National Association of Corporate Directors (NACD Survey). Available at www.nacdonline.org/Store/ProductDetail.cfm?ItemNumber=8493.

[3] *2014 Report on Senior Executive Succession Planning and Talent Development*, The Institute of Executive Development (IED) and the Rock Center for Corporate Governance of the Graduate School of Business at Stanford University (Rock Center Report). Available at www.gsb.stanford.edu/cldr/research/surveys/talent.html.

[4] David F. Larcker, Scott Saslow, and Brain Tayan, *How Well Do Corporate Directors Know Senior Management?* The Conference Board, in consultation with IED and the Rock Center (Conference Board Report). Available at www.gsb.stanford.edu/sites/default/files/TCB_DN-V6N5-14.pdf.

"in the field" from May to July 2013.[5] The findings reflect responses from 645 organizations, reflecting a cross section of the non-profit sector. The largest single industry sector reflected in the survey responses is healthcare, representing nearly 25 percent of total respondents.[6] The survey questionnaire reflected several new questions from prior versions of the survey and presented a broad array of leading governance-related issues. It is significant that matters of executive succession are identified as a highlight of the survey.

In comparison, both the Rock Center and Conference Board surveys concentrate on large, principally publicly traded companies. The survey questions focus primarily on matters of executive development and executive succession, search, and selection processes. The data contained in the Rock Center Report and Conference Board Report reflect several sources, including (for the Rock Center Report) older surveys the Rock Center had conducted that were included to provide historical perspective, as well as new surveys and interviews conducted by Rock Center with IED and, separately, by Rock Center and The Conference Board.[7] This is particularly relevant given new studies that show that the rate of executive turnover is highest in the healthcare sector.[8]

Executive Succession Practices

The NACD Survey presents the notable conclusion that only 30 percent of non-profit boards have a formal succession planning process and more that 25 percent do not have any process of discussion (even informal) with respect to CEO succession planning. Looking at that data more closely indicates that the use of a formal succession plan is higher with respect to larger non-profits—but the figure is still below 50 percent. Regardless of the formality applied to the succession practices, they typically address such matters as the development of internal candidates, emergency CEO succession, the identification of an interim CEO, and the use of an executive search firm. In addition, 50 percent of non-profit directors responding to the survey indicated dissatisfaction with the level of organizational succession planning.

Many of the NACD results are validated by portions of the Rock Center Report. That particular analysis indicates that while most of the interviewees believe in the importance of executive succession planning, more than a majority think their own organizations are sufficiently unprepared for eventual changes in the CEO and other senior leadership positions. Similarly, the Rock Center interviewees indicate a lack of confidence in existing board practices intended to identify future leaders. The survey results suggest a tendency of directors to "greatly underestimate the difficulty, time, and cost associated with CEO and C-suite succession planning."[9]

Related findings include the following:

- Corporate boards often fail to consider individual executive candidates in the context of the skill set the company requires for those positions; there is a disconnect between required skills and experience and the qualifications of individual candidates, whether they be internal or external.
- Even though most corporate boards recognize the importance of establishing a formal executive succession process, they fail to establish such a process. In addition, boards often fail to have the necessary boardroom-level discussions on executive succession and performance.
- Many formal executive succession processes fail to adequately integrate the internal constituents necessary for an effective process (e.g., the board and its key committees, the senior leadership team, and the legal and human resources leadership). In addition, many executive performance indicators fail to measure an executive's achievements in developing successors, "mentees," and "direct reports."
- Similarly, many executive succession processes are not fully integrated with overall organizational talent development programs; they are managed in different "silos" and limit the ability of the succession process to fully understand the talents and capabilities of other members of the senior management team—particularly from the perspective of possible successors. (See comments below on The Conference Board Report.)

[5] NACD Survey, p. 4.
[6] *Ibid.*
[7] Rock Center Report, p. 15; Conference Board Report, p. 6–7.
[8] See, e.g., "2013 November CEO Report: 94 CEO Changes, Health, Gov't Lead," Challenger, Gray & Christmas, Inc. Available at www.challengergray.com/press/press-releases/2013-november-ceo-report-94-ceo-changes-health-govt-lead.
[9] Rock Center Report, p. 1.

These results are significant, given the fact that the selection and supervision of the CEO is generally perceived as one of the most significant responsibilities of the governing board.

Executive Development Practices

The Conference Board Report sheds additional light on the level of governance involvement in the executive development process. In particular, this report concludes that most surveyed directors lack an extensive exposure to members of the senior leadership team (other than the CEO) outside of the boardroom environment. This was found despite directors' regular interaction with those executives in the boardroom context. Similarly—and perhaps as might be expected—they lack an appreciation of the particular skill sets and performance history of senior executives. This, in turn, creates a significant barrier to effective executive development and succession practices.

Specific related findings of The Conference Board Report include the following:

- Less than two-thirds of surveyed companies have a formal senior executive talent development plan.
- Even a smaller percentage of companies follow the practice of assigning a board member to "mentor" one or more senior executives.
- While most responding directors report being kept apprised of the development of senior executives, they do not claim to have a strong level of awareness of the professional accomplishments and limitations of those senior executives.
- While most of the responding directors have interaction with senior executive leadership through formal board processes, only two-thirds of those responding acknowledged knowing members of senior leadership in a professional manner (i.e., through interaction on a specific board/management-related task or assignment).
- A substantial minority (28 percent) of the responding directors leverage the boardroom/professional access to meet with senior executives outside of the presence of the CEO.
- The substantial majority of responding directors do not formally participate in the performance evaluation of senior management (apart, of course, from the CEO).

Accordingly, The Conference Board Report recommends that companies increase both formal and informal interaction between the board and the senior leadership team.[10]

Best Practice?

Of course, it is important to put the observations of these surveys into the proper perspective, for purposes of board discussion. Reports prepared by commercial policy organizations and academic organizations can make a strong contribution to internal board and external discourse on effective governance practices. In addition, they can serve to provide an important frame of reference for what may be considered "normal and customary" governance practices for boards of similarly situated organizations.

However, they are not intended to constitute statutory requirements, nor are they intended to reflect established governance best practices or other forms of aspirational goals. Board members breach no fiduciary duty by failing to adopt processes consistent with these survey results. This is particularly with respect to surveys that cut across non-profit/public company sectors, or surveys that focus only on public companies. Yet, governance of sophisticated non-profit corporations is generally well advised to consider relevant trends affecting the governance of both non-profit and public companies. This is particularly the case with emerging trends such as executive succession and development. For such reasons, consideration of these surveys by a hospital or health system board should be considered by a regulator, a court, or other third party as consistent with good faith efforts to improve governance effectiveness.

Conclusion

The three surveys suggest that the issue of executive succession and leadership development is an important, emerging area of governance focus. They also suggest that much work remains to be done before many boards have a proper grasp of the underlying issues, challenges, and opportunities. The data reflects a general recognition of the importance of succession, search, and talent development practices. It also confirms what appears to be an increasing level of concern within boardrooms with the manner in which these practices are being pursued within the organization. For these reasons, the surveys speak

[10] Conference Board Report, p. 1–2.

to the significant value attributed to a board-level dialogue on the relationship of these issues to healthcare governance, *and* to the proper extent of engagement with these issues that should be given by the board.

The Governance Institute thanks Michael W. Peregrine, Esq., partner, McDermott Will & Emery, LLP, for contributing this article. He can be reached at mperegrine@mwe.com.

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Expensive Mistakes: Preventing Technical Violations of the Stark Law

By Holly Carnell and Anna Timmerman, McGuireWoods, LLP

The Stark law generally prohibits physician referrals of designated health services (DHS)[11] for Medicare and Medicaid patients if the physician (or an immediate family member)[12] has a financial relationship with the entity the patient is referred to and to prohibit billing for such services, unless an exception applies.[13]

The Stark law is referred to as a "strict liability" law because violations may occur without any improper intention. Stark law compliance is mandatory, and if a physician makes a prohibited referral and no exception applies, penalties can be imposed. Examples of penalties include: denial of payment or refund of monies received, civil penalties of up to $15,000 per service,[14] and exclusion from Medicare and/or state healthcare programs including Medicaid.[15] The False Claims Act also imposes treble damages up to $11,500 in fines for each claim submitted or retained in violation of the law.[16]

While not formally delineated as such in the Stark law statute or regulations, violations may be characterized as either "substantive" or "technical" in nature. "Substantive" violations target core issues the law was designed to prevent, such as a hospital's payment for physician services above fair market value. Examples of substantive violations by DHS entities may include: failure to have certain financial relationships with physicians memorialized pursuant to a written agreement, calculating a physician's salary or bonus based on referral volume, or leasing office space to a physician below fair market value. *U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc.* is a recent example of such alleged substantive Stark law violations. The court ordered Tuomey Healthcare System to pay approximately $237,000,000 in fines after finding that the system had agreements in which physicians' compensation fluctuated based upon Tuomey's net collections for physicians' procedures.[17]

"Technical" violations tend to be unintentional acts, like forgetting to sign a contract, allowing a contract to expire without renewal, or unintentionally omitting an element of an exception from the agreement. Because these violations are typically unintentional, they occur more frequently, and it is estimated that roughly 95 percent of DHS entities (i.e., healthcare providers that render DHS, like hospitals, labs, imaging centers, etc.) have arrangements with physicians that are technically

[11] The following services are considered "designated health services" under Stark law: clinical laboratory services; physical therapy services; occupational therapy services; outpatient speech-language pathology services; radiology and certain other imaging services; radiation therapy services and supplies; durable medical equipment and supplies; parenteral and enteral nutrients, equipment, and supplies; prosthetics, orthotics, and prosthetic devices and supplies; home health services; outpatient prescription drugs; and inpatient and outpatient hospital services. 42 C.F.R. § 411.351.

[12] "Immediate family member" is defined under the Stark law as including spouse, birth, or adoptive family members, stepfamily members, in-laws, grandparents, grandchildren, and even spouse of a grandparent or grandchild. 42 C.F.R. § 411.351.

[13] See 42 C.F.R. §§ 411.355–411.357 for list of exceptions.

[14] 42 U.S.C. §1395nn(g)(3).

[15] See Office of Inspector General, *A Roadmap for New Physicians: Fraud & Abuse Laws*. Available at http://oig.hhs.gov/compliance/physician-education/01laws.asp.

[16] 42 C.F.R. § 1003.100(b)(viii).

[17] Scott Becker and Molly Gamble, "An Overview of the Tuomey Healthcare Case," *Becker's Hospital Review*, October 4, 2013. Available at www.beckershospitalreview.com/legal-regulatory-issues/5-things-to-know-about-the-tuomey-healthcare-case.html.

in violation of the Stark law.[18] Nonetheless, even "technical" violations can result in large penalties for providers.

Discovery of Violations

Technical violations generally are inadvertent and are harder to discover but often surface during: 1) internal compliance reviews, 2) diligence pursuant to a merger or acquisition, or 3) a government investigation. However, the Stark law does not distinguish between "substantive" and "technical"—all violations are subject to the same penalties.

A DHS entity may proactively conduct an internal compliance review to identify any areas of noncompliance. Technical violations uncovered during internal reviews are sometimes reported to the government pursuant to the Medicare self-referral disclosure protocol. For example, in 2013, Intermountain Healthcare settled alleged Stark law violations involving payments to more than 200 doctors with the Department of Justice (DOJ) for $25,500,000.[19] Intermountain voluntarily disclosed potential violations after uncovering the potential issues through a regular internal review of its arrangements with physicians, most of which were "technical" in nature.[20]

Violations are also identified during diligence reviews pursuant to a merger or acquisition. In 2010, the DOJ announced that Detroit Medical Center (DMC) had agreed to pay $30,000,000 to settle allegations that it violated the Stark law and other laws by "engaging in improper financial relationships with referring physicians."[21] The violations were discovered during a due diligence review in connection with DMC's sale to Vanguard Health Systems, Inc. (VHS). Most violations involved "office lease agreements and independent contractor relationships that were either inconsistent with fair market value or not memorialized in writing."[22] Alleged violations also included improper perks for doctors, including special compensation, entertainment, and unreasonable lease deals.[23] As is typical, VHS's ultimate acquisition of DMC was contingent on DMC's resolution of any liability in connection with the alleged violations.

Government investigations can also uncover "technical" Stark law violations. Westerly Hospital in Rhode Island recently settled allegations of improper payments to and arrangements with physicians following an investigation by the federal government into allegations including failing to maintain accurate records of compensation arrangements with physician leaders and failing to document and update lease arrangements with physicians. Westerly settled nine potentially improper agreements for $500,000 and stated that many violations resulted from "sloppy paperwork."[24]

Exceptions for "Technical" Violations

Phase II and III of the Stark law regulations provide some limited relief for "technical" violations. Although this relief does not fundamentally alter the Stark law's basic scope of prohibited referrals, the regulations nonetheless reflect flexibility to minimize the Stark law's effect on common business arrangements through some limited exceptions.

In Phase II, CMS added an exception for certain arrangements involving temporary noncompliance with a Stark law exception, which allows DHS entities and physicians to submit claims for DHS provided during a period when an arrangement was noncompliant, if certain requirements are met. In Phase III, CMS extended this temporary noncompliance provision to address temporary noncompliance with *signature* requirements applicable to many Stark law exceptions.[25]

Although this exception provides some relief to noncompliant parties, DHS entities and physicians should not rely on these provisions for every

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[18] See Jean Wright Veilleux, "Catching Flies with Vinegar: A Critique of the Centers for Medicare and Medicaid Self-Disclosure Program," *Health Matrix*, Vol. 22, No. 1, January 2012.
[19] See Joe Carlson, "Intermountain to Pay $25.5 Million to Settle Stark Case," *Modern Healthcare*, April 3, 2013. Available at www.modernhealthcare.com/article/20130403/NEWS/304039948.
[20] *Ibid.*
[21] David Burda, "Detroit Medical Center to Pay $30 Million Settlement," *Modern Healthcare*, January 3, 2011. Available at www.modernhealthcare.com/article/20110103/MAGAZINE/301039988.
[22] Department of Justice, Office of Public Affairs, "Detroit Medical Center Pays U.S. $30 Million to Settle False Claims Act Allegations, Allegedly Engaged in Improper Financial Relationship with Referring Physicians," December 30, 2010. Available at www.justice.gov/opa/pr/2010/December/10-civ-1484.html.
[23] Burda, 2011.
[24] Dale P. Faulkner, "Settlement Outlines Investigation," *The Westerly Sun*, June 22, 2013.
[25] 42 C.F.R. § 411.353(g).

oversight, as each provision can be used only once every three years with respect to the same referring physician.[26] Moreover, these provisions are not applicable in many cases of noncompliance. For example, the Phase II exception for temporary noncompliance is limited to instances where noncompliance is due to "reasons beyond the control" of the DHS entity, which CMS has not really defined beyond stating that this determination is made on a case-by-case basis.[27] The provision also protects DHS services provided only "during the period of time it takes the entity to rectify the noncompliance," which must not exceed 90 days after the date the agreement became noncompliant. Likewise, the exception for temporary noncompliance with a signature requirement is limited to 90 or 30 days after the compensation arrangement became noncompliant, depending on whether the noncompliance was inadvertent.

This short-term exception provides little relief when a noncompliant agreement remains undetected for years—Intermountain Healthcare's alleged violations spanned from 2000 to 2009.[28] Critics argue that the temporary noncompliance provisions do little to relieve the burden of "technical" mistakes and have urged CMS to toll the exceptions until the date the noncompliance was discovered. CMS, however, has defended the current regulations by stating that a "discovery-based" rule is difficult for the government to monitor and enforce, and that it is the responsibility of DHS entities and physicians to regularly monitor compliance with the Stark law to ensure detection of noncompliance is made in a timely fashion.[29]

Contract Holdovers

The Stark regulations also provide some flexibility for temporarily noncompliant space or equipment rental and personal services agreements by incorporating holdover provisions. Under the holdover provisions, the arrangement continues for up to six months after the expiration of the term of the written agreement if the arrangement between the parties during the holdover period continues *on the same terms and conditions as the expired written agreement*. The holdover provision protects arrangements in which the agreement does not automatically renew and provides the parties with time to negotiate the terms of a new written agreement.

Unlike with the temporary noncompliance provisions, there is no limit on how often the holdover provision can be used for one referring physician; however, the terms from the previously valid agreement must not change during the holdover period (e.g., no rent increases unless the expired lease included a holdover rent premium). Furthermore, the six-month cutoff period cannot be extended. If the violation extends beyond six months for any reason, such as a long eviction process, the technical violation will not be excused by the holdover provision and constitutes a violation of the Stark law.[30]

Recommendations to Avoid "Technical" Violations

To avoid "technical" violations of the Stark law, DHS entities and physicians need to be proactive in evaluating financial relationships with physicians. Although technical violations will occur, DHS entities and physicians can decrease the chance of violating the Stark law by following the recommendations listed below.

Financial Relationship Sign-Off

The broad definition of "financial relationship," which includes direct and indirect relationships, under the Stark law may cause DHS entities and physicians to easily miss an improper financial relationship.[31] In addition, arrangements with physicians whose family members are also physicians practicing in the community or whose family members otherwise have financial relationships with the DHS entity may lead to violations of the Stark law. To help prevent these violations, the DHS entity should make a specific person or department responsible for reviewing and signing off on each direct and indirect financial arrangement the DHS entity maintains with a referring physician. The DHS entity should require physicians with whom it maintains financial relationships to annually provide conflict-of-interest information on their and their immediate family members' direct or indirect employment arrangements, investments, and other financial activities to allow the DHS entity to evaluate whether problematic relationships exist.

[26] See, e.g., 42 C.F.R. § 411.353(f), (g).
[27] CMS suggests that removal of a Health Professional Shortage Area designation is "beyond the control" of the DHS entity. 72 Fed. Reg. 51012, 51025–51026 (September 5, 2007).
[28] Carlson, 2013.
[29] 72 Fed. Reg. 51012, 51025 (September 5, 2007).
[30] 72 Fed. Reg. 51045.
[31] 42 C.F.R. § 411.354(a).

Drafting Checklist

To ensure an arrangement is compliant with the Stark law, a DHS entity should consider using a drafting checklist to determine, for example, whether the agreement:

- Contains an evergreen clause to prevent termination while the parties continue to perform under the agreement.
- Satisfies each element of an applicable Stark law exception.
- Was cross-referenced against and added to the DHS entity's master list of agreements.

Also, parties should regularly review and update agreements to ensure they remain compliant as laws evolve.

Drafting Techniques

Certain drafting techniques may also help reduce the likelihood of a Stark law violation. For example, an evergreen clause allows an agreement to automatically renew unless otherwise terminated. Arrangements that are unlikely to change over time could benefit from the addition of an evergreen clause. However, such clauses should not be used when fair market value determinations should be reviewed periodically. In addition, while not strictly necessary, a DHS entity may desire to include certain provisions that proactively anticipate a potential holdover of the contract. If a holdover rental premium is included in the contract, for example, the premium must still be consistent with fair market value at the time the agreement is initially executed.

Contract Management

DHS entities should consider adopting contract management software to assist the DHS entity in monitoring all its physician agreements. Such software provides monitoring capabilities by: 1) notifying parties of approaching agreement expiration dates, 2) aggregating all contracts in a searchable repository, and 3) customizing workflows, which incorporate checklists and verify whether required elements are included in the contract, alerting the drafter when deviations from the workflow occur.

Seek Advice from Legal Counsel

If any potential violation has occurred, before self-disclosing such violation, DHS entities and physicians should discuss the specific facts with legal counsel experienced in Stark law compliance to determine whether another exception may be applicable or whether the arrangement is even subject to the Stark law.

The Governance Institute thanks Holly Carnell, associate, and Anna Timmerman, associate, McGuireWoods, LLP, for contributing this article. The discussion and recommendations outlined in this article are intended to assist DHS entities and physicians in complying with the Stark law. If you have any questions about Stark law compliance or would like advice regarding a potential violation, please contact one of the authors. They can be reached at hcarnell@mcguirewoods.com and atimmerman@mcguirewoods.com.

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BoardRoom Press, Volume 25, No. 2 (*BoardRoom Press*, April 2014)

Healthcare Governance Amidst Systemic Industry Change: What the Law Expects
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