

Timothy Smith, CPA/ABV

EXCERPT FROM

The Complete Guide to

Fair Market Value Under the Stark Regulations



American Association
of Provider Compensation Professionals®

The Complete Guide to Fair Market Value Under the Stark Regulations

Timothy Smith, CPA/ABV
Editor





What It's Worth

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Dedication

To Mark Dietrich, my mentor, sponsor, colleague, and friend,

Just as iron sharpens iron, friends sharpen the minds of each other. (Proverbs 27:17, CEV)

Two are better than one, because there is a good reward for their labor together. (Ecclesiastes 4:9, MEV)

Thank you for all you have done for me and for this profession!

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Part I.
Introduction

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Editor's Introduction: How to Use This Guide

1. Introduction to This Guide

This guide focuses on the definition of fair market value (FMV) under the newly enacted Stark regulations published on Dec. 2, 2020, with an effective date of Jan. 19, 2021.¹ To be more accurate, the guide focuses on the new *definitions* of FMV, since there are now three formal definitions of the term: one general definition, one for equipment rentals, and another for office space leases. Each of these definitions references the concept of general market value (GMV). The Centers for Medicare & Medicaid Services (CMS) also adopted three definitions for GMV: one for asset purchases, one for compensation for services, and one for rentals of equipment or office space. To address Stark FMV, therefore, this guide looks at both sets of definitions.

This guide also focuses on the content of the “preamble commentary” that accompanied the new Stark regulations. In this commentary, CMS discusses its views of the meanings and implications of the new definitions of FMV and GMV. It includes the rationales for the definitions the agency adopted, along with related concepts and requirements for meeting these definitions. As part of the commentary, CMS also summarizes various public comments that it received in developing the final definitions, along with its direct responses to those comments. These public comments were provided to CMS in response to its proposed Stark regulations that were published in 2019.² Much of this guide will concentrate on the text of the preamble commentary more than the regulatory definitions themselves, using a topical or thematic approach to the content.

2. The Role of the Public Comments in Developing the New Stark FMV

The purpose of this guide is twofold. The first objective is to provide industry participants with a factual and expanded view of the public comments made to CMS as part of its update of the Stark regulations. These comments are important because they both influenced the agency's development of the regulatory definitions of FMV and GMV and framed much of the context

1 See regulations beginning at 85 F.R. 77492.

2 See proposed regulations beginning at 84 F.R. 55766.

for CMS' preamble commentary. Understanding this background is critical for interpreting and applying the final definitions as well as the preamble commentary to real-world situations. Certain aspects of the definitions as well as selected passages or statements from the preamble commentary may appear to have one meaning, when taken in isolation as a singular declaration. Yet, read in the broader framework of input from industry participants, the text of the regulations and commentary may have a different meaning or set implications for compliance practices.

Indeed, I have observed some of the industry's interpretations of CMS' preamble commentary on FMV to be off the mark, reflecting misunderstandings of key concepts. In my view, much of this misinterpretation stems from the fact that many industry players simply did not have the background to identify the appropriate meanings of various terms or statements in the new regulations. That view was a function of my knowledge of the background story to the new regulations for FMV. My colleague, Mark Dietrich, and I had been major contributors of public comments to CMS. I had also spent time reading the responses of other industry participants that were posted on the government's website for public comments for the update to the Stark regulations.³ Familiarity with this background material provided an enhanced and more precise framework by which to assess what CMS said or did not say, along with what it rejected or simply ignored, in its approach to updating the regulatory definitions of FMV and GMV.

One of the purposes of this guide, therefore, is to provide the industry with this background and context for interpreting and applying the new Stark regulations for FMV compliance. BVR and I "data mined" the public records for the actual text of industry comments CMS cited in the preamble commentary. We also searched the public comments for any other substantive remarks about Stark FMV that CMS did not reference in the commentary. We then organized and presented these public comments in the guide in a way that streamlines and facilitates an understanding of the ideas and recommendations that CMS evaluated in finalizing the text of the new regulations.

The second section of this guide ("Public Comments and CMS Responses") presents the full text of public comments CMS cites in the preamble commentary.⁴ Each chapter examines one grouping of public comments/response from the commentary, including CMS' summary of the public comments, the actual full text of the comments, and CMS responses to the comments. Readers can see for themselves what industry participants said to CMS and how it responded to specific points. They can also evaluate issues raised in the public comments that CMS did not directly address.

We also included another section referencing public comments that backfills for areas of the conceptual development that CMS did not highlight or explicitly discuss in the final regulations (see the "CMS Revisions and the Public Comments: The Hidden Story" section). Chapters in this section trace the impact of certain public comments that appear to have had an impact on

³ See [regulations.gov/document/CMS-2018-0082-0394](https://www.regulations.gov/document/CMS-2018-0082-0394) for the comments.

⁴ 85 F.R. 77555 to 77558.

CMS' thinking for the final regulations but were not directly referenced. This guide, therefore, provides a unique perspective on the regulatory development process that is usually not found in publications dealing with government regulations.

3. Approaching the New Stark FMV Thematically and Holistically

The second purpose of this guide is to provide a topical or thematic presentation of CMS' preamble commentary to further facilitate an improved understanding of Stark FMV. The organization of this commentary in the Federal Register is not well suited to the study and examination of specific concepts or themes. In addition to the dense three-column format of this federal publication and CMS' penchant for overly long paragraphs, the material is provided as historical (i.e., what CMS said in the past) and as response to selected comments. Thus, there is not a logically developed and readily accessible exposition of terms, concepts, and analysis of Stark FMV in the regulations themselves.

Buried in this clunky and bureaucratic format, there is actually a generally coherent account of doctrines and conceptual development from CMS about Stark FMV. One simply has to take the time and effort to reorganize the material to recognize the key ideas and development of a logical framework for this regulatory definition of value.⁵ The fourth section of this guide ("Topical Discussions") presents the results of such an effort. The chapters in Part 4 focus on the various concepts, doctrines, and nuances that are found throughout the preamble commentary, discussing them thematically and evaluating them analytically. Using this approach, consistency and interrelationships among concepts and topics begin to emerge. This fact is borne out by the frequent repeating and cross-referencing of themes within these chapters.

Each chapter in Section 4 generally follows a similar format of first examining the actual text of CMS' commentary on a given topic, followed by an analysis and evaluation of this commentary. The textual examination may include not only a specific statement or passage from the preamble commentary, but also related commentary from the past (Phase I to Phase III from the 2000s) or proposed (2019) regulations. As part of this historical examination, consistencies with or departures from the prior or proposed regulatory positions of CMS are identified. Next, the potential implications and applications of CMS' commentary for valuation practice are discussed and assessed within each chapter for each topic or theme.

This comprehensive approach to encountering the regulatory text at a topical or thematic level provides interpretative guardrails for the healthcare compliance community. As we now know from CMS' explicit statements in the newly enacted regulations, much of the industry's past interpretation of FMV, as it related to use of the market approach and particularly survey data for physician compensation, was incorrect. CMS did not favor the market approach over the

5 That's logical in the sense of the Stark law being a given.

other two approaches to value. More importantly, CMS had no policy that survey data, or specific percentiles of survey data, always indicated the appropriate level for Stark FMV.

Nonetheless, much of the industry's popular thinking promoted in conferences, webinars, and publications argued that CMS had such a policy and favored the exclusive use of the market approach. These inaccurate interpretations appeared to stem, at least in part, from many in the industry looking at one or two statements from the preamble commentary and developing complete FMV constructs from them. Learning from this experience, an interpretative safeguard is to evaluate and interpret any singular statement or passage by considering the whole of CMS' preamble commentary. In other words, interpreting CMS holistically and comprehensively is the best practice for understanding and applying the commentary for Stark FMV compliance purposes.

This holistic and comprehensive hermeneutic (i.e., principle of interpretation) is used in the topical chapters in this guide. In these chapters, topics are addressed relative to specific passages in the text, while these same concepts are also related to other passages and concepts to ensure that the totality of CMS' commentary is evaluated when analyzing a specific topic or theme.

4. An Educational and Desk Reference Resource

In addition to its use educationally, this guide is also designed to be used as a desk reference resource for researching specific topics and issues. The topical discussion chapters naturally lend themselves for examining CMS' guidance on specific issues. For some topics, review of the public comments and responses may shed additional light on the relevant issues that the user of this guide should consider in interpreting CMS' statements. BVR and I anticipate that the guide will become a highly productive and needed resource for the members of the healthcare compliance community that deal with issues of FMV.



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