

# Using the New Value-Based Rules to Enhance Your ACO

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In November 2020, the Centers for Medicare & Medicaid Services (CMS) finalized value-based exceptions under the Stark law, and the Office of Inspector General (OIG) finalized value-based safe harbors under the Anti-Kickback Statute to accommodate and facilitate the evolution of value-based care arrangements among health care providers.

These new rules protect compensation relationships with providers in a value-based care arrangement and provide a stairway for providers to migrate into risk-based contracting.

A concept referred to as a “value-based enterprise” (VBE) is the centerpiece of these new rules. The VBE is the hub that serves to plug participating providers into the value-based initiatives and the protection of these new rules.

An accountable care organization (ACO), with its resources and network of providers, is uniquely qualified to function as a VBE. By adding additional processes and procedures, and operating as a VBE, an ACO can greatly expand its horizons, aggregating physicians and new innovative partners to pursue opportunities to participate in commercial risk-based contracting while still providing traditional services for Medicare beneficiaries.

As providers migrate toward risk-based contracting, the new value-based rules provide more flexibility under the Stark and Anti-Kickback Statute regulatory regimes and eliminate some classic compliance risks. Notable distinctions under these new rules include:

- Profit distributions, including net profits from ancillary services, can be paid directly to physicians in a group practice through a value-based enterprise.
- There are no fair market value requirements for compensation once the providers participate in risk-based and partial risk-based contracts (i.e., no legal battles over fair market value determinations for Stark and the Anti-kickback Statute).
- There is no prohibition on compensation varying with the volume or value of referrals.

An ACO functioning as a VBE can pursue commercial payor contracts in addition to federal programs and use these new rules to aggregate and compensate providers in ways it could not do before.

Additionally, because ACOs are primary care-led value-based initiatives, an ACO functioning as a VBE can allow primary care physicians to participate with specialists and other health system value-based care initiatives and share in the profits as the VBE evolves into a risk-bearing organization.

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