



Akerman Senterfitt
ATTORNEYS AT LAW

THE LEGAL **PITFALLS
OF MEDICAL OFFICE BUILDING
DEVELOPMENT/LEASING**

By: Valerie Larcombe, Esquire

I. Primary Legal Issues Faced by the Health Care Organization

Safe Harbor/Exception

(Antifraud and Stark)

Bond-Financed Facility Safe Harbor
Inurement

II. Medical Office – Organizational Scenarios

III. Contractual Issues from the Health Care Organization's Point of View

I. Primary Legal Issues Faced by Health Care Organizations (HCO)

A. Tax-Exemption Issues

- Private Benefit
- Private Inurement
- Tax-Exempt Financing



B. Anti-Kickback Issues

- State
- Federal

C. Stark Law and State Anti-Self Referral Law Issues

A. Tax-Exempt Issues

1. Organizational Test

The HCO must be structured to further a “charitable” purpose. “Health care” is a charitable purpose.

2. Operational Test

a. Charitable Purpose

The HCO must be operated exclusively in furtherance of its charitable purpose to the benefit of the community.

b. Community Benefit/Need

Any private benefit to an individual must be qualitatively/quantitatively incidental.

A. Tax-Exempt Issues

2. Operational Test

a. Private Inurement

- No part of the HCO's net earnings (profits) may inure to the benefit of an "Insider."
- Insider - individuals who are in a position to control or influence the HCO by virtue of their relationships to it.
- "Physicians and Executive Management" are insiders.
- Even an incidental benefit may be inurement.

A. Tax-Exempt Issues

3. Penalty

Private Benefit:

- Revocation of Tax Exempt Status
- Closing Agreement

Inurement:

- Revocation of Status
- Intermediate Sanctions



A. Tax-Exempt Issues

4. Private Use of Bond-Financed Facilities

a. Qualified Users

Governmental

501(c)(3)

No Unrelated Trade

b. Permitted Private Use

Absent Safe Harbor More Than De Minimis Use Is Precluded (De Minimis is Five Percent of Net Proceeds For Qualified Bonds Issued)

B. Anti-Kickback Issues

1. Prohibition

THE FEDERAL ANTI-KICKBACK STATUTE PROVIDES CRIMINAL PENALTIES FOR INDIVIDUALS OR ENTITIES THAT KNOWINGLY AND WILLFULLY OFFER, PAY, SOLICIT, OR RECEIVE REMUNERATION INTENDED TO INDUCE THE REFERRAL, PURCHASING, LEASING, ORDERING OR ARRANGING FOR ANY GOOD, FACILITY, SERVICE, OR ITEM REIMBURSED BY THE MEDICARE PROGRAM OR OTHER STATE HEALTH CARE PROGRAMS, SUCH AS MEDICAID. THE TYPES OF REMUNERATION COVERED INCLUDE KICKBACKS, BRIBES, AND REBATES WHETHER MADE DIRECTLY OR INDIRECTLY, OVERTLY OR COVERTLY, OR IN CASH OR IN KIND.

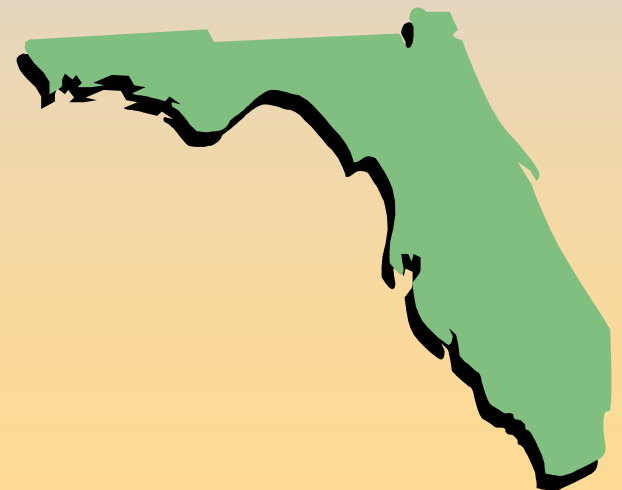
- “Scienter” required
- Penalties include criminal sanctions

B. Anti-Kickback Issues

2. Florida Law

Florida's Patient Brokering Act tracks the Federal law but specifically precludes the payment of commissions and bonuses to induce patient referrals.

- Not limited to Medicare/Medicaid patients
- Includes criminal sanctions



C. Stark Law Issues

1. General

- THE STARK LAW BROADLY PROHIBITS A PHYSICIAN FROM REFERRING A MEDICARE OR MEDICAID PATIENT TO AN ENTITY PROVIDING A DESIGNATED HEALTH SERVICE IF THE PHYSICIAN OR AN IMMEDIATE FAMILY MEMBER OF THE PHYSICIAN HAS A FINANCIAL RELATIONSHIP WITH THAT ENTITY.
- Sanctions for submitting a Medicare/Medicaid claim in violation of the Stark Law include civil money penalties up to \$15,000 per service, assessments equal to twice the dollar value of each service, and/or exclusion from the Medicare and Medicaid programs.

C. Stark Law Issues

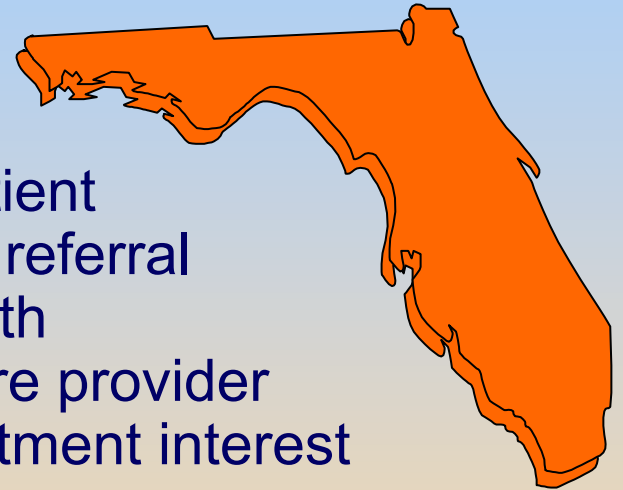
2. Designated Health Services

- Stark II was passed as part of the Omnibus Budget Reconciliation Act of 1993, effective January 1995. Stark II expands the self-referral ban to a total of eleven (11) services:
 - Physical Therapy Services;
 - Occupational Therapy Services;
 - Radiology Services, including Magnetic Resonance Imaging, Computerized Axial Tomography Scans, and Ultrasound 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;
 - Inpatient and Outpatient Hospital Services.

C. Stark Law Issues

3. Florida Law

- Absent exception, Florida's Patient Self Referral Act precludes the referral of a patient for designated health services in which the health care provider is an investor or owns an investment interest
- Unlike Stark, applies to all patients
- Applies to investment interest, not all "Compensation Arrangements"
- Exceptions are not identical to Stark II



Distinguishing Fraud and Abuse Laws from Stark II

Though the two laws target many of the same activities, they are separate and distinct laws with different penalties.

Under Stark II, intent to induce referrals need not be shown in order to impose penalties. Stark is a strict liability statute. The terms of Stark and the Stark Safe Harbors are specific. Any deviation from the specific exceptions detailed in the law are presumed illegal.

In contrast, conduct falling outside the Safe Harbors of the fraud and abuse law is not necessarily illegal. Thus, when reviewing contracts and activities, a provider should analyze compliance with both laws.



Some or all of these Laws are Implicated in Leases of Space

FRAUD ALERTS

Special fraud alerts are used by the Office of Inspector General (OIG) to identify abuses within the industry.

Physician incentives that are particularly suspect include:

- Free or below market space/equipment rental rates;
- Low-interest or interest-free loans, or loans that may be “forgiven” if a physician refers patients (or some number of patients) to the hospital;

II. Exception/Safe Harbor for Rental of Office Lease

STARK II

42 C.F.R. § 411.357

1. The agreement is set out in writing;
2. The agreement is signed by the parties;
3. Specifies the premises covered by the lease;

ANTI-KICKBACK PROVISIONS

42 C.F.R. § 1001.952(b)

1. The agreement is set out in writing;
2. The agreement is signed by the parties;
3. The lease covers all of the premises to be leased and specifies the premises to be provided by the agent;

II. Exception/Safe Harbor for Rental of Office Lease

STARK II

4. Space rented does not exceed that which is reasonable and necessary for the legitimate business purposes of the lease;
5. Space used exclusively by the Lessee when being used by the Lessee (common area maintenance)
6. The term of the agreement is for at least one year;

ANTI-KICKBACK PROVISIONS

4. The aggregate space leased does not exceed that which is reasonably necessary to accomplish the commercially reasonable business purpose of the rental;
5. [Nothing comparable]
6. The term of the agreement is for at least one year;

II. Exception/Safe Harbor for Rental of Office Lease

STARK II

7. The rental charge to be paid over the term of the agreement is set in advance;
8. The rental charge is consistent with fair market value;
9. The rental charge is not determined in a manner that takes into account the volume or value of referrals or other business generated between the parties;

ANTI-KICKBACK PROVISIONS

7. The aggregate rental charge to be paid over the term of the agreement is set in advance;
8. The rental charge is consistent with fair market value in arms-length transactions;
9. The rental charge is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties for federal or state health program patients;

II. Exception/Safe Harbor for Rental of Office Lease

STARK II

10. Agreement would be commercially reasonable even if no referred between lessee and lessor.
11. [Nothing comparable]

ANTI-KICKBACK PROVISIONS

10. If the agreement is for periodic services, rather than on a full-time basis, the arrangement specifies the schedule, length and charge of such interval services.
11. Fair market value – mans value of the rental property for general commercial purposes and not adjusted to add value due to proximity or convenience to sources or referrals or other business generated.

II. Medical Office Building – Organizational Structures

- A. Hospital owns – Leases to M.D.s**
- B. Hospital – Co-General partner of limited partnership - M.D. limited partners**
- C. Hospital – Ground leases to limited partnership**
- D. Hospital – Leases space – limited partner**



III. Contractual Provisions from the Health Care Organization's View

- ❖ Medical Staff Requirement
- ❖ Permitted/Prohibited Uses
- ❖ Rights of First Refusal
- ❖ Dissolution of Partnership caused by sale of general partner's interest
- ❖ Disclaimers
 - No obligation to buy out M.D.s
 - No obligation to market building for sale within a time certain
- ❖ Change of Law
- ❖ Management Agreement – Affirmative obligation to lease at fair market value





Thank You!

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