

# **Physician Practice Acquisition**

## Stark Law

- Unless an exception applies, Stark prohibits referrals to an entity for the furnishing of “designated health services,” payable under Medicare or Medicaid made by a physician with a “financial relationship” with the entity.
- An entity may not present a claim or bill for designated health services from prohibited referral.
- Congressional intent to control over-utilization of government health program reimbursed services.
- 42 USC sec. 1395nn; 42 CFR Subpart J

# Designated Health Services — What Does the Law Cover?

- ▶ Inpatient and outpatient hospital services
- ▶ Clinical laboratory services
- ▶ Physical therapy services
- ▶ Occupational therapy services and speech–language pathology
- ▶ Radiology services and certain imaging services (including but not limited to x–ray, ultrasound, C.A.T., M.R.I. other services listed by HCFA)
- ▶ Durable medical equipment & supplies
- ▶ Parenteral and enteral nutrients, equipment and supplies
- ▶ Prosthetics, orthotics, and prosthetic devices and supplies
- ▶ Home health services
- ▶ Outpatient prescription drugs
- ▶ Radiation therapy services and supplies

# STARK LAW

## ***Stark Exceptions: 42 CFR sec. 411.355 - 411.357***

- ▶ Personal services arrangements
- ▶ Physician recruitment
- ▶ **Leases**
- ▶ Non-monetary compensation
- ▶ Medical staff incidentals
- ▶ In-office ancillaries
- ▶ Fair market value
- ▶ Referral services
- ▶ Obstetrical malpractice insurance subsidies
- ▶ Professional courtesy
- ▶ Retention payments in underserved areas
- ▶ Electronic prescribing items and services
- ▶ Electronic health records items and services
- ▶ **Bona fide employment**
- ▶ Compliance training
- ▶ **Isolated transactions**
- ▶ Indirect compensation
- ▶ Remuneration unrelated to DHS
- ▶ Community wide information systems

## *Isolated Transactions* (42 C.F.R. §411.357(d))

- ▶ Isolated Transactions, such as the one-time sale of property or a practice:
  - ✓ Payment is fair market value and does not take into account the volume or value of any referrals or other business generated between the parties;
  - ✓ Agreement would be commercially reasonable if the physician made no referrals to the entity;
  - ✓ There are no additional transactions between the parties for six months after the transaction (except for ones that meet other compensation or ownership exceptions under Stark or post-closing adjustments;

# Fair Market Value

- ▶ Narrow regulatory definition for Stark (42 CFR §411.351)
- ✓ Value in arm's-length transactions, consistent with general market value
- ✓ General market value means compensation as result of bona fide bargaining between well informed parties not otherwise in position to generate business for other party
- ✓ Compensation does not take into account volume or value of anticipated or actual DHS referrals
- ✓ Should establish policies/procedures for making and documenting reasonable, consistent determinations of FMV

# Anti-Kickback Statute

- ▶ The federal Anti-Kickback Statute (“Anti-Kickback Statute”) is a criminal statute that prohibits the exchange (or offer to exchange), of anything of value, in an effort to induce (or reward) the referral of federal health care program business
- ▶ See 42 U.S.C. 1320a–7b

# Anti-Kickback Statute

- ▶ Both payor and recipient at risk
- ▶ Intent-based statute
  - “One Purpose” test – Is any one purpose to induce referrals?
- ▶ Criminal and Civil Penalties
  - 5 years imprisonment/\$25,000 fine
  - Civil monetary penalties
  - Exclusion



## Typical Reasons for Transaction

- ▶ Need for the development of a Physician Network
- ▶ New payment structures demand fully cooperative doctors clinically integrated with the hospital; e.g. quality payments, bundled payments, readmits, hospital acquired conditions
- ▶ Declining reimbursement for physicians
- ▶ Increasing complexity for physician

# Acquisition Timeline

Execution of  
Acquisition  
Agreement  
(Signing)

Consummation of  
Acquisition  
(Closing)

## Pre-Signing Period:

- Buyer conducts due-diligence
- Parties establish transaction structure
- Parties may execute a letter of intent (LOI), confidentiality agreement
- Parties negotiate acquisition agreement

## Pre-Closing Period:

- Buyer conducts due diligence
- Parties make necessary governmental filings and obtain consents and approvals
- Board of Directors adopt necessary resolutions
- Parties perform pre-closing covenants

## Post-Closing Period:

- Parties deal with post-closing purchase price adjustments and indemnification claims
- Post-closing obligations (access to records, transition patients, etc.)

# Letter of Intent

- ▶ A Letter of Intent is generally nonbinding with respect to the transactional terms
- ▶ Benefits
  - Establishes key terms in advance to confirm mutual consideration before expending time and effort on transaction
  - May include binding provisions such as exclusivity (“no shop”) and confidentiality
  - May assist parties with related transactions or arrangements such as financing for transaction, negotiating with managed care payors, or ensuring employees of parties intent
- ▶ How Detailed should it be?

# Overview of Asset Purchase Agreement

- ▶ Introductory provisions – title, preamble, recitals
- ▶ Action Sections – assets, liabilities, payment, closing
- ▶ Representations and Warranties
  - Buyer's Reps & warranties
  - Seller's reps & warranties
- ▶ Closing Conditions
  - Buyer's closing conditions and deliveries
  - Seller's closing conditions and deliveries
- ▶ Covenants (confidentiality, noncompete, due diligence access, post-closing matters)
- ▶ Endgame - Indemnification
- ▶ Miscellaneous
- ▶ Schedules & Exhibits

# Action Section in Acquisition

## ▶ Assets

- Describes which assets will be acquired, which assets are excluded
- Examples: tangible property, leases, contracts, licenses, records, etc.

## ▶ Liabilities

- Describes the liabilities that will be acquired or excluded
- Usually split on Effective Time of acquisition
- Examples: taxes, employee benefits, contract obligations, professional or general liability claims, accounts payable, repayments under gov't programs

## ▶ Payment Provisions

- Purchase price, escrow arrangements

## ▶ Closing

# Closings and Closing Dates

## ➤ Closing

Parties exchange financial consideration and transfer assets or entity

## ➤ Closing Date

- In person vs. virtual

## ➤ Effective Time

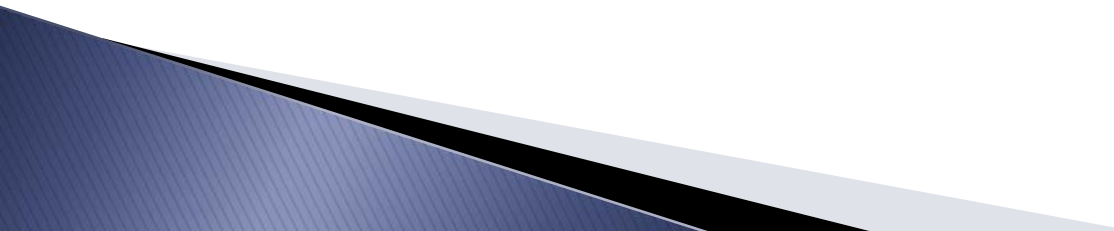
- States the time when the transaction becomes effective, usually 11:59 p.m. or 12:01 a.m. on the Closing Date

# Conditions to Closing

[Stark § 11.4]

- ▶ Sets forth the conditions that must be satisfied for parties to be obligated to close deal
- ▶ Typically includes:
  - Closing Deliveries
  - Statement that all reps and warranties are true
  - All covenants were satisfied
  - No material adverse changes
  - All licenses, permits, agreements are in effect
  - Other conditions specific to the deal

# Closing Deliveries

- ▶ Bills of sale for assets
  - ▶ Assignment and assumption agreements (contracts, leases, licenses)
  - ▶ Deeds (for real property)
  - ▶ Certificates (bring-down, incumbency, authorizing resolutions, good standing)
  - ▶ Opinions and consents
- 



# Conditions to Closing - Drafting

- ▶ Use “must” instead of “shall”
  - “Must” signals a condition
  - “Shall” signals a covenant
- ▶ Relation to Covenants
  - Typically, one closing condition is that all covenants satisfied
  - But, not all conditions are covenants
  - Some post-closing covenants are not conditions
  - There may be a separate section listing covenants (e.g., Seller must grant access for due diligence)

# Schedules & Exhibits

## ► Schedules

- Typically used to disclose information that would otherwise be included in reps and warranties (or covenants)
- The information can be supplemental or provide exceptions.

## ► Exhibits

- Documents that the parties want treated as part of the agreement
  - Forms of agreements to be executed
  - Previously signed agreements (less common in the United States)
  - Documents that display technical information.
  - Documents that demonstrate the calculation of a formula in the contract (a type of “legislative history”).

# Exhibits - Example

**Assignment and Assumption Agreement.** On or before the Closing Date, Buyer shall have received executed copies of an assignment and assumption agreement substantially in the form of Exhibit F (the “**Assignment and Assumption Agreement**”) executed by the Seller: (i) conveying to Buyer all of Seller’s right, title, and interest in, to, and under the Assumed Contracts  
...

# Signatures

[Stark Ch. 17]

- ▶ Drafting signature blocks
  - Include the exact corporate name in signature block (ensure it is correct and matches the preamble), “By: [authorized officer’s signature]”
  - Check organizational documents – who, how many officers need to sign the agreement?
- ▶ Officers’ Certificates
  - You will need a certificate of incumbency for the officer(s) who sign the agreement (signed by the Secretary)
  - Bring-down certificate
  - Certificates for Board Resolutions
- ▶ Signature page
  - Stand-alone page
  - Counterparts

# Signatures - Counterparts

**Generally in miscellaneous (boilerplate) provisions**

**12.5 Counterparts.** This Agreement may be executed in one or more counterparts, including by means of e-mail, .pdf, or facsimile copies of signature pages, each of which shall be deemed to be an original, but all of which shall be one and the same document.