These materials should not be considered legal advice.

They are not intended to nor do they create an attorney-client relationship.

The materials are general and may not apply to a particular individual legal or factual circumstances.

Typical Lawyer blah blah
OVERVIEW

• Real Estate Deals
• Healthcare Laws Apply
  – Stark Law
  – Anti-kickback Statute
• Stark Exceptions, AKS Safe Harbors & Real Estate Key Concepts
• Stuff Goes Wrong
  – Defensive Stark
  – Self-Disclosure
  – Real Life Examples
• Compliance Tips
HEALTHCARE REAL ESTATE DEALS

• Leasing
• Purchases
• Practice Acquisitions
• Development/MOB’s

Shhhhhhhhh.....

*With Physicians or Other Potential Referral Sources*
Overview of Healthcare Laws
THE FEDERAL STARK LAW


• Physician may not refer:
  – Medicare* patients
  – for certain specified “designated health services”
  – to an entity with which the “physician” or
  – an “immediate family member” has
  – a “financial relationship”

• Unless an “exception” applies

* Statute applies to Medicaid but not implemented thus far by CMS
• **Two Basic Prohibitions**
  
  - **First**, if a “physician” (or “immediate family member”) has a “financial relationship” with an “entity,” then the physician may not “refer” Medicare patients “to” the entity for the furnishing of “designated health services,” unless an exception applies.
• **Two Basic Prohibitions**
  
  - Second, an entity may not bill Medicare (or any other individual or entity) for services furnished pursuant to a prohibited referral
STARK LAW: KEY TERMS

• “Referral”
  – Does not include personally performed services
• “Designated Health Services” (DHS)
  – Includes “inpatient and outpatient hospital services”
• “Entity” is person or entity that performs service billed as DHS or submits a claim for DHS
• “Physician” and “immediate family member” defined broadly (see 411.351)
• “Financial Relationship”
  – May be ownership/investment interest or compensation arrangement
  – May be direct or indirect*
  – May exist between physician and DHS entity, or between physician’s immediate family and DHS entity

* All Stark Law definitions are technical. Definition of indirect compensation arrangement is very technical
If Stark is triggered, a DHS provider **MUST** meet an exception to avoid penalties.

**Penalties include:**
- Monetary fines ($15K per fraudulent claim + 2x the amount claimed, $10K/day for failure to report, and $100K for each circumvention scheme).
- Reimbursement of $$ to Feds and patients;
- Loss of eligibility.
- Potential False Claims Act Liability/ “Whistleblower” (qui tam) lawsuits.

**NO CRIMINAL INTENT REQUIRED TO PROVE STARK VIOLATION!**
- This means that a violation is a violation, whether intentional or inadvertent.
- No materiality threshold (even very minor violations are subject to severe penalties).
• Exceptions for both ownership/investment and/or compensation arrangements
  – Some exceptions apply just to ownership/investment arrangements (411.356), some apply just to compensation arrangements (411.357), and some apply to both types of arrangements (“service exceptions”) (411.355)
  – Many more exceptions for compensation arrangements than for ownership/investment arrangements
ANTI-KICKBACK STATUTE (AKS)

• Prohibited Conduct (42 U.S.C §1320a-7b(b)
  – Under the Anti-Kickback, it is illegal to knowingly or willfully:
    • Offer, pay, solicit, or receive remuneration;
    • Directly or indirectly;
    • In cash or in kind;
    • In exchange for;
      – Referring an individual; or
      – Furnishing or arranging for a good or service; and
    • For which payment may be made under Medicare, Medicaid, or other federal health care programs

• Applies to both payers and recipients of kickbacks
  – Applies not only to hospitals, but to any person or entity in a position to influence referrals.
ANTI-KICKBACK STATUTE (AKS)

• “Remuneration” includes anything of value
  – Can be cash, discount off fair market value, or even an opportunity to invest.

• Intent
  – Remuneration intended to induce referral or purchase of services
  – Greber “one purpose test” – The anti-kickback statute is violated if one purpose of the payment in question is to induce referrals, regardless of any other legitimate purposes.
  – PPACA amends/clarifies the “intent” requirement
    • A person may violate the AKS without specific knowledge of, or specific intent to, violate the AKS

THIS IS THE CURRENT STANDARD!
AKS: PENALTIES

• Criminal Statute
  – Felony
    • Harder for Feds to prove, so not used as often as Stark (often enforced against physician groups)
  – Not more than 5 years, not more than $25,000, or both

• Civil Sanctions
  – Exclusion from Medicare/Medicaid
  – CMP of up to $50,000 and damages of up to 3x the amount of the kickback
AKS: SAFE HARBORS

- **9 Statutory Exceptions** – Congress
- **25 Regulatory Safe Harbors** – OIG

  “Because the law is broad on its face, concerns arose among health care providers that some relatively innocuous – and in some cases even beneficial – commercial arrangements are prohibited by the anti-kickback law. Responding to these concerns, Congress in 1987 authorized the Department to issue regulations designating specific ‘safe harbors’ for various payment and business practices that, while potentially prohibited by the law, would not be prosecuted.”
**AKS: SAFE HARBORS**

- **Safe Harbors Generally:**

  The safe harbor regulations define practices that are not subject to the AKS because such practices would be unlikely to result in fraud or abuse. The safe harbors set forth specific conditions that, if met, assure entities involved of not being prosecuted or sanctioned for the arrangement qualifying for the safe harbor.

  **Safe harbor protection is afforded only to those arrangements that precisely meet all of the conditions set forth in the safe harbor.**

  Failure to fit within a safe harbor does not automatically imply violation of the AKS; instead, the OIG must make a determination, based on the facts, of whether the arrangement adequately reduces the risk that the remuneration provided could be an improper payment for referrals or for arranging for referrals of Federal healthcare program business.
Stark Exceptions, AKS
Safe Harbors & Key Concepts
Stark Exceptions
STARK LAW: EXCEPTIONS

• Space and Equipment Leases
  – Rental of Office Space
    • Per CMS guidance, no other exceptions are applicable to the rental of office space
      – Not eligible for the exceptions for fair market value compensation or payments by a physician (Phase III)
        » Office space is not an “item” or “service”
      – BUT SEE INDIRECT COMPENSATION ARRANGEMENTS

• Personal Service Arrangements
• Indirect Compensation Arrangements
• Isolated Transactions (Not Covered)
Exceptions for the Rental of Space/Equipment require:

- The agreement be set in writing, signed by the parties and must specify the premises/equipment covered.
- The term of the agreement must be at least 1 year. If the agreement is terminated during the term with or without cause, the parties may not enter into a new agreement during the first year of the original term.
- The Space/Equipment rented must not exceed that which is reasonable and necessary for the legitimate business purposes of the lease or rental.
  - Payments may be made for pro rata portion of common areas.
- The rental charges must be set in advanced and must be consistent with Fair Market Value ("FMV").
Exceptions for the Rental of Space/Equipment require:

• The charges of the term of the agreement must not be determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.
  – No percentage Compensation
  – No Per Click/Per Service Leases
    • To the extent that it reflects patients referred from owner/landlord to the lessee

• The agreement must be commercially reasonable even if no referrals were made between the lessor or lessee

• Month-to-month holdovers are permissible up to six months following a compliant arrangement
  – Must continue on same terms and for same space
  – Escalator clauses permissible, but must be in the original agreement (i.e., “set in advance”)
Exceptions for the Rental of Space/Equipment:

• Commentary Insight
  – CMS’s current position on amending leases:
    • Amendments, including to the compensation terms, are allowed, provided that: “(1) All of the requirements of an applicable exception are satisfied; (2) the amended rental charges or other compensation (or the formula for the amended rental charges or other compensation) is determined before the amendment is implemented and the formula is sufficiently detailed so that it can be verified objectively; (3) the formula for the amended rental charges does not take into account the volume or value of referrals or other business generated by the referring physician; and (4) the amended rental charges or compensation (or the formula for the new rental charges or compensation) remain in place for at least 1 year from the date of the amendment.”
  – The exclusivity requirement and office sharing arrangements:
    • “Both the statute and our regulations require that the lessee have exclusive use of the leased space or equipment when the lessee uses the space or equipment. In effect, § 411 357(a)(3) and (b)(4) require that space and equipment leases be for established blocks of time ”
**STARK LAW: EXCEPTIONS**

**Personal service arrangements** between a physician (or immediate family member) and DHS entities are permissible so long as they meet the following requirements:

- Each arrangement is in writing, signed by the parties, and specifies the services to be provided.
- The arrangement must cover all of the services to be provided by the physician or family member.
- The services to be provided must be reasonable and necessary for the legitimate business purposes of the arrangement.
- Term of at least one year
- Compensation must be set in advance, be consistent with Fair Market Value ("FMV"), and may not vary due to value or volume of referrals.
- The services must not involve counseling or promotion of a business arrangement or other activity that would violate State or Federal law.
Direct Compensation Relationships

- No intervening organization between physician/physician organization and DHS entity
  - Host of exceptions for direct compensation relationships
- “Stand in the shoes” ("SITS") concept
  - Physician will stand in the shoes of his/her “physician organization” if the physician has an ownership interest in the physician organization
    - Physicians with “titular” ownership interests do not stand in the shoes
  - Other physicians (employees/contractors) allowed to SITS
Indirect Compensation Relationships

- Must *also* meet 3 part test:

  - Unbroken chain of >1 financial relationships
  - Focusing on the compensation arrangement closest to the referring physician, the aggregate compensation varies with volume or value of referrals to DHS entity
  - DHS entity knows referring physician’s compensation varies with volume or value referrals
STARK LAW: EXCEPTIONS/INDIRECT COMPENSATION

- **Physician Owner**
- **Physician Employee**

**Group**

**Hospital**

- **Lease** (Compensation Arrangement)

- **Permissive SITS**
  Can be either direct compensation arrangement, indirect compensation arrangement, or no compensation arrangement

**Direct Compensation Due to SITS**

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STARK LAW: EXCEPTIONS/INDIRECT COMPENSATION

- **Group**
- **Group RE Holding Entity**
- **Hospital**
  - **Lease** (Compensation Arrangement)
  - $$$

- **Physician Owner**
- **Physician Employee**
  - Either: (i) no compensation arrangement; or (ii) indirect compensation arrangement

Either: (i) no compensation arrangement; or (ii) indirect compensation arrangement
STARK LAW: EXCEPTIONS/INDIRECT COMPENSATION

Either: (i) no compensation arrangement; or (ii) indirect compensation arrangement

Either: (i) no compensation arrangement; or (ii) indirect compensation arrangement
No Compensation Arrangement = No Stark

If Indirect Compensation → Indirect Compensation Exception

- Compensation must be fair market value and not vary with volume or value of referrals or other business
  - No percentage Compensation for equipment/space
  - No Per Click/Per Service Leases for equipment/space
    - To the extent that it reflects patients referred from owner/landlord to the lessee
- Except for employment, the arrangement must be in writing, signed, specify services
- Must not violate anti-kickback statute

Tip: Indirect exception more user-friendly than most other Stark Law exceptions. Does not require comp to be set in advance
AKS Safe Harbors
AKS: SAFE HARBORS

• Space Rental
• Equipment Rental
• Personal Services and Management Contracts
• Sale of Practice (not covered)
AKS: SAFE HARBORS

**Space and Equipment Rental “Safe Harbor”**

- Signed, written agreement
- Agreement covers (and specifies) all of the premises/equipment leased between the parties
- If access to the premises/equipment is periodical, the lease specifies exactly the schedule of such intervals, their precise length and the exact rent for such intervals
- The term of the lease is for not less than one (1) year
- The aggregate rental charge is set in advance, consistent with fair market value and is not determined in a manner that takes into account the volume or value of any referrals
- The aggregate space/equipment leased does not exceed that which is reasonably necessary to accomplish the commercially reasonable business purpose of the lease
**Personal Services or Management Services Contract**

- Signed, written agreement
- Agreement covers (and specifies) all of the services the agent provides to the principal for the term of the agreement
- If the agency agreement is for periodic/part-time services (vs. full time), the agreement specifies exactly the schedule of such intervals, their precise length and the exact charge for such intervals
- The term of the agreement is for not less than one (1) year
- The aggregate compensation is set in advance, consistent with FMV and is not determined in a manner that takes into account the volume or value of referrals or business which payment is made by a federally funded healthcare program
- The services performed do not violate state/federal law
- The aggregate services contracted for do not exceed those which are reasonably necessary to accomplish the commercially reasonable business purpose of the services
Real Estate Key Concepts
KEY CONCEPTS: OIG SPECIAL FRAUD ALERT – SPACE LEASES

• **Appropriateness of Rental Agreements** – Is payment for rent appropriate?
• **The Rental Amounts** – Rent must be at FMV, fixed in advance and not take into account the volume or value of referrals. Examples of suspect arrangements:
  – Rental amounts in excess of amounts paid for comparable property rented in arms-length transactions between those not in a position to refer business
  – Rental amounts for subleases that exceed the rental amounts per square foot in the primary lease
  – Rental amounts that are subject to modification more often than annually

OIG Special Fraud Alert, February 2000; http://www.oig.hhs.gov/fraud/docs/alertsandbulletins/office%20space.htm
KEY CONCEPTS: OIG SPECIAL FRAUD ALERT – SPACE LEASES

- **Time and Space Considerations** – Rent should be for a size and for a time that is reasonable and necessary for a commercially reasonable business purpose. Examples of suspect arrangements:
  - Rental amounts for space that is unnecessary or not used
  - Rental amounts for time when the rented space is not in use by the supplier
  - Non-exclusive occupancy of the rented portion of space

OIG Special Fraud Alert, February 2000; http://www.oig.hhs.gov/fraud/docs/alertsandbulletins/office%20spacehtm
KEY CONCEPTS: FAIR MARKET VALUE

How Fair Market Value (FMV) is generally defined:
• The value in an arm’s-length transaction consistent with general market value.
  – General Market Value means the price that an asset would bring as a result of bona fide bargaining between well-informed buyers and sellers who are not otherwise in a position to generate business for the other party, on the date of the acquisition of the asset.

With respect to Leases, FMV:
• The value of rental property/equipment for general commercial purposes, but shall not be adjusted to reflect the additional value that one party (either the prospective lessee or lessor) would attribute to the property as a result of its proximity or convenience to sources of referrals or business otherwise generated for which payment may be made in whole or in part under Federally-funded healthcare programs
  – NOT medical office only
  – Can take into account additional costs incurred by landlord/developers in upgrading the property
KEY CONCEPTS: FAIR MARKET VALUE

• Other FMV considerations
  – OIG Supplemental Compliance Guidance (1/31/05)
    • Hospitals should have appropriate processes for making and
documenting reasonable, consistent and objective determinations of
FMV

• How does a Hospital landlord determine
  Fair Market Value?
  – Hospital should obtain an appraisal (although not
required by Stark).
    • Note – reputable modern healthcare appraisals often contain
“commercial reasonableness” opinions as well
    • Appraiser should “opine” as to Stark definition of
Fair Market Value.
    • Beware of:
      – Short and cursory
      – Incorrect FMV definition
      – Facts and assumptions do not equal reality
      – Appraisal shopping

• How often should you obtain an appraisal?
Key Considerations

- The FMV opinion/valuation provides a range of rental rates – What is the appropriate rate to use?
  - How does the subject property compare in terms of age, construction, class, condition, and location?
  - Are there any necessary adjustments?
    - Are some of the comparables on a ground lease, but others own the land?
    - Do the comparables represent arms-length transactions?
  - Is it possible to justify a rent outside of the stated market range?
- Would the FMV rate be different if a physician owned the building and was leasing to the hospital?
- What is the appropriate square footage measurement and application?
  - How is square footage measured for the subject property – USF or RSF?
  - Do other building owners in the local market charge rent based on USF or RSF?
**Key Concepts: Commercial Reasonableness**

<table>
<thead>
<tr>
<th>Department of Health and Human Services Definition¹</th>
<th>Stark Definition²</th>
<th>OIG Threshold³</th>
</tr>
</thead>
<tbody>
<tr>
<td>An arrangement which appears to be “a sensible, prudent business agreement, from the perspective of the particular parties involved, even in the absence of any potential referrals.”</td>
<td>“An arrangement will be considered ‘commercially reasonable’ in the absence of referrals if the arrangement would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician of similar scope and specialty, even if there were no potential designated health services (‘DHS’) referrals.”</td>
<td>Compensation arrangements with physicians should be “reasonable and necessary.”</td>
</tr>
</tbody>
</table>

KEY CONCEPTS: COMMERCIAL REASONABLENESS

$ Fair Market Value

Dollars and Cents

Scope: Range of Dollars Only

Key Question: “How Much”?  

Commercial Reasonableness

Dollars and Sense

Scope: Overall Arrangement

Key Question: “Why”?  

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KEY CONCEPTS: SQUARE FOOTAGE

• Facilitates benchmarking
  – Allows “apples to apples” rental rate and operating expense comparison

• Impacts building value
  – SF measurement and associated rental income will be carefully scrutinized by potential third-party buyers / institutional investors

• Affects regulatory compliance
  – Improper measurement and application of square footage could result in over under payment of rent, and may trigger violations under Stark, even if unintentional
KEY CONCEPTS: SQUARE FOOTAGE

• **BOMA** – Building Owners and Managers Association - Professional organization that provides a number of resources to building owners and managers. BOMA’s Standard Methods of Measurement publication is widely accepted and regarded as the industry “gold standard” for building square footage measurement. ([www.BOMA.org](http://www.BOMA.org))

• **Gross Building Area** – Total constructed area of a building. Generally not used for leasing purposes, but may be used in a build-to-suit scenario or master lease scenario where a single tenant occupies the entire building.
KEY CONCEPTS: SQUARE FOOTAGE

• **Common Area** – Areas that provide services or convenience to tenants, but are not within a tenant’s “four walls”
  – Building lobbies/corridors
  – Public restrooms
  – Conference centers
  – Excludes vertical penetrations such as elevator shafts, stairwells, and mechanical/plumbing chases.

• Cost to the Lessee cannot exceed its pro rata share of the expenses based on the percentage of exclusive space used by all the lessees
  – Phase III comments narrowed the definition of Common Area to exclude exam rooms.
• **Useable Square Footage (USF):**
  – Tenant USF - Measured area of an Office Area, effectively the space within a tenant’s “four walls.”
  – Building USF – Sum of all Tenant USF within a building.

(Note: Often the market standard in smaller, more rural markets.)
**KEY CONCEPTS: SQUARE FOOTAGE**

- **Tenant Rentable Square Footage (RSF):**
  - *Tenant RSF* - Tenant USF plus an allocation of Common Areas.
  - *Building RSF* – Sum of all Tenant RSF within a building.
  (Note: Often the market standard in larger, more urban markets.)

- **R/U Ratio** – calculated as Building RSF / Building USF - Conversion factor applied to tenant USF to calculate Tenant RSF.

- **Load Factor or Loss Factor** – similar to R/U ratio, may be building specific or market driven.
KEY CONCEPTS: SQUARE FOOTAGE

SF Application:

- $16 / USF does not equal $16 / RSF
  - Scenario – 10,000 carpetable/USF, 11,000 RSF
  - $16.00 / SF x 10,000 USF = $160,000
  - $16.00 / SF x 11,000 RSF = $176,000

- Improper measurement and application of square footage could result in over / under payment of rent and may trigger regulatory violations
  - If RSF is the market standard, but Hospital applies USF metric and leases space to physicians at $160,000 annual rent, has Hospital under-charged the physicians?
    
    \[
    \text{[$160,000 / 11,000 RSF = $14.55 / RSF]}\]

- What if physicians own building and lease to Hospital?
  - If USF is market standard, but Hospital applies RSF metric and leases space from physicians at $176,000 annual rent, has Hospital over-paid the physicians?
    
    \[
    \text{[$176,000 / 10,000 USF = $17.60 / USF]}\]
KEY CONCEPTS: SQUARE FOOTAGE

SQUARE FOOTAGE KEYS

• Understand the local market standard for area measurement, quoted lease rates, and impact on FMV rental rates
• Understand the appraisal or valuation report – square footage basis, comparables utilized & necessary adjustments
• Incorporate specific language into standard lease document to specify the method of measurement and communicate proper application
• Consult architect or other qualified professional for assistance in space classification and measurement, if needed
• Maintain consistent standard of measurement throughout building
• Update measurements as appropriate to reflect renovation, expansion, etc.
KEY CONCEPTS: SHARED SPACE/TIMESHARING

• Shared space or Timesharing is permissible so long as
  – Block Lease
    • Lease must contemplate blocks of time, no less than 4 hrs., where the leasing provider has **exclusive use** of the space.
    • Sharing of common areas is acceptable so long as it is contemplated in the written lease.
  – Lease should clearly set the use schedule for the space
    • Generally, the schedule should not vary from week to week or result in the space being “held” for a physician who is only paying for the part time use.

• There are restrictions or prohibitions on some entities sharing space (e.g. IDTFs are prohibited from sharing or subleasing space).
KEY CONCEPTS: SERVICES PROVIDED BY LESSOR

• Any additional services provided by the lessor must be clearly detailed in the signed lease and ensure that such services are included in the rental rate.
  – Storage space
  – IT and Telecommunications services
  – Garbage Disposal
  – Hazardous Waste Disposal
  – Administrative Support
  – Etc.

• Lessor should monitor the space and services provided. Any new services or changes to existing services must be accounted for in amendments to the lease or a new agreement.

• Consider a separate written agreement for additional services.
KEY CONCEPTS: ISOLATED TRANSACTIONS

• Isolated Transactions, such as one time sale of a property or medical practice are acceptable so long as:
  – Sale price is consistent with Fair Market Value;
  – Meets “volume or value” or other business-generated standards; and
  – Is commercially reasonable notwithstanding the value of any referrals.

• Exception allows for “integrally related installment payments”
  – Total aggregate amount must be set before the first payment is made and cannot consider the value of referrals or other business generated.
    • Payments must be immediately negotiable if any outstanding balance is guaranteed by a third party, negotiable promissory note or other mechanism that assures payment.
    • Parties must assure that the physician makes the payments even in the event of a default by the purchaser or obligated party.

• Parties may not conduct additional transactions within 6 months unless the transactions fit within another exception.

• Post-closing adjustments may be made, so long as the adjustments are commercially reasonable in the absence of other referrals or generated business.
SPECIFIC LEASING CHALLENGES

- Accommodations that are not commercially reasonable
- Proper allocation of services shared with the Hospital
- CAM/Additional Rent
  - Base Year issues
- Expired Leases
- Failure to enforce Operating Expenses pass-throughs
- Failure to implement annual rent increases required by lease terms
- Providing tenant services not discussed in the lease (i.e., medical waste disposal)
- Space occupied different from space described in Lease.
- Unsigned leases
- Confirming FMV
SPECIFIC LEASING CHALLENGES

- Space needed?
- Guaranty Issues
- Hospital as sub landlord
  - Administrative Fee?
    - Sublandlord overhead expenses to process billing and manage subtenant relations, surrender of property
  - Insurance Reimbursement?
  - Services Reimbursement/Full Cost Pass-through?
  - Rent Divergence?
Stuff Goes Wrong
The Stark Law is notoriously Complex:

CMS has issued no less than six sets of regulations and the interpretation of the statute has evolved with every iteration.

- Virtually no “Bright lines” under the statute
- The complexity of the definitions and exceptions make it very difficult to interpret and apply the rules.
• Dates of relationship/Stark Law at time of potential issue
• Electronic Signatures/UETA
• Grace Period
• No Indirect Compensation = No Stark
  – If Indirect Compensation, Meets Exception for Same
• Gray Areas
## Real Life Examples

<table>
<thead>
<tr>
<th>Organization</th>
<th>Fine</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dorminy Medical Center</td>
<td>$50,000 settlement</td>
<td>Free use of hospital space</td>
</tr>
<tr>
<td>New England Sinai Hospital</td>
<td>$1.5 million settlement</td>
<td>In part, free or less than FMV leases</td>
</tr>
<tr>
<td>Condell Medical Center</td>
<td>$36 million settlement</td>
<td>Leases below FMV</td>
</tr>
<tr>
<td>Christus Spohn Hospital</td>
<td>$4.1 million settlement</td>
<td>Leases below FMV</td>
</tr>
<tr>
<td>Westfields Hospital</td>
<td>$204,150 settlement</td>
<td>No written lease</td>
</tr>
<tr>
<td>St. James Healthcare-Montana</td>
<td>$275,000 settlement</td>
<td>No written lease</td>
</tr>
<tr>
<td>Ivinson Hospital-Wyoming</td>
<td>$635,000 settlement</td>
<td>Leases below FMV</td>
</tr>
<tr>
<td>Parkridge Medical Center – Chattanooga, TN</td>
<td>$16.5 million settlement</td>
<td>Leases above FMV (physician landlord); release of physician tenant from lease obligation</td>
</tr>
<tr>
<td>Bristol Hospital and Bristol Gastroenterology Associates, PC (Bristol, CT)</td>
<td>$157,830 settlement</td>
<td>Occupying space w\out a written lease and rent not collected</td>
</tr>
</tbody>
</table>
  
  – Qui Tam case filed by a competitor to a hospital alleged that the Hospital’s lease of a nuclear camera from a physician group violated the Stark Law.
  
  – Despite the lease being a fixed rate and set in advance, the Western District of Pennsylvania found that it did not fit any Stark exceptions as it was not based on Fair Market Value.
  
  • Evidence indicating that the valuation of the lease rate undertaken by the hospital was based, in part, on anticipated referrals from physicians.
  
  – Court held that even fixed lease payments might take into consideration the value of anticipated referrals and, therefore, without a clear non-referral basis for the valuation, be in violation of Stark.
**RECENT CASES**


- *Qui tam* whistleblower case alleging Tuomey violated the Stark Law and False Claims Act when it paid 19 part time physicians over Fair Market Value by anticipating the value of TC referrals.

- 4th Circuit provided some guidance on when fixed compensation takes into account the volume or value of referrals:
  - The fact that a physicians is being paid for personally performed services does not automatically mean that Stark is a non-issue.
  - For inpatient/outpatient hospital services, a Stark analysis will always be necessary because there will always be a referral of the TC whenever the physician provides a PC.
  - Anticipated referrals of DHS cannot be considered when establishing physician compensation.
  - The amount of the compensation must reflect only the FMV of the professional services being provided.

- On May 9, 2013, after a 4 week retrial, a new jury found Tuomey Healthcare guilty of submitting False Claims, which could result in the Hospital facing up to $397 million in penalties as a result.
New Rules of the Game:

• Fraud Enforcement and Recovery Act (FERA).
• Patient Protection and Affordable Care Act (PPACA).
HEALTHCARE REFORM:
NOTABLE CHANGES IN COMPLIANCE

• **FERA** expands scope of False Claims Act (basis of most “whistleblower” lawsuits), imposes clear obligation on hospitals to make repayments of Medicare/Medicaid reimbursements that are disqualified due to Stark violation.

• **PPACA** requires hospitals to disclose and refund overpayments.
  – PPACA also give CMS authority to negotiate and settle self-disclosed Stark violations w/o having to apply strict statutory penalties.

• Increased funding for Fraud and Abuse enforcement, projected expenditures of $350MM through 2020; Feds see high return on this investment, “low hanging fruit” to offset high cost of new government health care programs.
SELF-DISCLOSURE PROTOCOLS

• CMS Self-Referral Disclosure Protocol revised by CMS in May 2011 for disclosure of Stark Law violations
• OIG Self-Disclosure Protocol originally released in 1998, was updated on April 17, 2013 for disclosure of potential criminal, civil, or administrative violations subject to imposition of CMPs.
  – Potential Stark Violations must be reported through the CMS protocol unless associated with potential AKS violations.
• Intent: to encourage self-reporting by holding out hope of favorable settlements.
• BUT, certain aspects of the disclosure protocols are potentially more onerous...
  – Voluntarily disclosed info can be used by DOJ, OIG for further civil, criminal prosecution, including False Claims Act suits
  – Parties must agree not to appeal any penalties assessed as part of any settlement
• Although “Voluntary”, post-Health Reform, providers must report and repay all overpayments within 60 days of discovery.
• “Chilling Effect” on self-disclosure? Too early to tell, until more cases are settled under the new protocols.
  – No one wants to be the guinea pig.
  – End result may not be what the Feds intended.
Compliance Tips
COMPLIANCE TIPS

• Document!
• Sign!
• Break out separate types of relationships
  – 1 contract for space lease; 1 for equipment lease; 1 for services
    • OR
  – If in 1 contract clearly delineate all services, and breakout different payments for the same
• Use autorenewals/evergreen clauses
  – Can have mutual termination rights in autorenewal cycles
• Encourage indirect financial relationships
  – If you must contract with a physician owned entity, the physician entity should not be a group practice
• To the extent possible, individual physicians instead of physician groups should be parties to the contract or other arrangement
• FMV and commercial reasonableness opinions
  – Stay away from the generalists and the dabblers
  – If no opinion, diligence and documentation from other sources (brokers, bank executives, comparables, et cetera)
• Simpler arrangement = better. Many Stark Law violations are the result of oversight, confusion, or a failure to monitor relationships.
  – Avoid automatic adjustments to rent (e.g., % increases, increases tied to CPI, etc.), *unless* you track and enforce the same
    • But be aware of FMV issues
  – Avoid contract provisions imposing late fees or other penalties, *unless* you track and enforce the same
  – Include an “error and omissions” clause in the writing that describes how the parties will address mistakes that arise in the course of the performance of the arrangement
• Conduct annual FMV rent studies
• Have BOMA standard measurements in place for all MOB assets
• Utilize lease administration technology to track critical dates/rent escalations/OPEX CAM RECs for all tenants/organize tenant lease/property information
• Have dedicated policies and procedures for the operations of MOB assets
• Have a form lease and defined leasing/lease approval process/ rent collection/delinquency process
• Have a system by which spaces are periodically checked (particularly time share-part time suites) to insure that use and use periods conform to the lease
• Conduct monthly review of MOB operations and tenant status
Questions?