Healthcare Real Estate: Navigating Stark Law and the Anti-Kickback Statute in Real Estate Leasing

July 20, 2016
Fraud & Abuse
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• **Fraud**
  – Gaining something of value through intentional misrepresentation or concealment of material facts

• **Abuse**
  – Any practice inconsistent with rules, regulations or ethical standards which provides unfair gain for those with access to programs or responsibilities in the public trust
Fraud & Abuse

- Mistake
- Inefficiencies
- Bending the Rules
- Intentional Deception

Examples:
- Incorrect coding
- Medically unnecessary service
- Improper billing practices (such as, upcoding)
- Billing for services or supplies that were not provided
Enforcement Environment

• “The days of scamming dollars from our health care system are over. . . . Thanks to new tools contained in the Affordable Care Act, we are more prepared than ever to safeguard taxpayer dollars . . . .”
  — U.S. Health and Human Services Secretary Kathleen Sebelius

• The Affordable Care Act provides additional tools and resources to fight fraud in the health care system by providing an additional $350 million over the next ten years.
Fraud & Abuse Laws – Key Concerns

• Over-utilization
• Increased costs to the Government
• Corruption of medical decision-making
• Harm to beneficiaries
• Unfair competition
Fraud & Abuse Laws

• The Anti-Kickback Statute
• The Physician Self-Referral Law (the Stark Law)
• The False Claims Act
• The Civil Monetary Penalties Law
• The Exclusion Authorities
• HIPAA Fraud Laws
• General Fraud Laws
• State Laws
Anti-Kickback Statute
Anti-Kickback Statute

- 42 U.S.C. § 1320a-7b(b)
- Criminal statute (intent) that prohibits the exchange of anything of value in an effort to induce/reward referrals
- Broadly drafted
- Establishes penalties for individuals and entities on both sides of the prohibited transaction
Anti-Kickback Statute - Prohibitions

Prohibits

• Remuneration in cash or in kind (anything of value)
  – Lease payments below or above fair market value
• Offered, paid, solicited, received
• To induce or reward referrals
• Knowingly and willfully
  – One purpose test
Anti-Kickback Statute - Penalties

**Criminal:**
- Fines up to $25,000 per violation
- Up to a 5 year prison term per violation

**Civil/Administrative:**
- Civil monetary penalties and program exclusion
- Potential $50,000 CMP per violation
- Civil assessment of up to three times amount of kickback
- False Claims Act liability
Anti-Kickback Statute – Exceptions and Safe Harbors

**Statutory Exceptions:**
- Certain types of payments are excluded from consideration (e.g. discounts, employer/employee, electronic health records)

**Regulatory Safe Harbors:**
- 42 C.F.R. § 1001.952
- Not mandatory
- Must fit squarely
Anti-Kickback Statute – Space Rental Safe Harbor

- The lease agreement is set out in **writing** and **signed** by the parties.
- The lease **covers all of the premises** leased between the parties for the term of the lease and **specifies the premises** covered by the lease.
- The term of the lease is for not less than **one year**.
- **Set in advance**
- Consistent with **fair market value**
- **Commercially reasonable**
Self-Disclosure

OIG Self-Disclosure Protocol ("SDP")
• Applies to conduct in violation of federal criminal, civil, or administrative laws

CMS Self-Referral Disclosure Protocol ("SRDP")
• Applicable only to physician self-referral violations
• Does not supersede OIG Self-Disclosure Protocol (SDP)
Stark Law
Stark Law Prohibitions

- a **physician** may not make a **referral**
- to an **entity** for the provision of a **designated health service ("DHS")** for which Medicare payment may be made (and the entity may not present a claim for services provided as a result of such a referral)
- if the physician or an immediate family member has a **financial relationship** with the entity
- unless either the referral or the financial relationship is “excepted” from the statute’s coverage
- Stark, unlike Anti-Kickback, is a **strict liability statute**
Stark Law – Penalties

• Civil sanctions
  – Denial of payment
  – Refunds of amounts collected
  – $15,000 for each bill/claim submitted
  – 3x amount claimed
  – $100,000 for each arrangement or “scheme”
  – Program exclusion

• False Claims Act liability
Stark Law – Compensation Exceptions

- Rental of office space and equipment
- Bona fide employment
- Personal services
- Physician recruitment
- Payments by a physician
- Isolated transactions
- Fair market value compensation
- Indirect compensation arrangements
- Timeshare Arrangements
Stark Law – Rental of Office Space Exception

- Agreement is set out in **writing, signed** by the parties and specifies the premises covered.

- Term of the agreement is at least **1 year**.

- The space rented or leased **does not exceed that which is reasonable and necessary** for the legitimate business purchases of the lease or rental.
  - Space must be used **exclusively** by the lessee when being used by the lessee and may not be shared with or used by the lessor or any other person/entity related to the lessor.
  - Common area charges are permitted if the payments to not exceed the lessee’s pro rata share.

- Rental charges over the term must be **set in advance** and consistent with **fair market value**.
Stark Law – Rental of Office Space Exception

• Rental charges may not be determined:
  – In a manner that takes into account the volume or value of referrals or other business generated between the parties; or
  – Using a formula based on (1) a percentage of the revenue raised, earned, billed, collected, or otherwise attributable to the services performed or business generated in the office space; or (2) per unit of service.

• Agreement must be *commercially reasonable* even if no referrals were made between the lessee and the lessor.

• Arrangement must not violate the Anti-Kickback Statute.
Stark Law –
Timeshare Arrangements Exception

• Agreement is set out in **writing, signed** by the parties and specifies the premises, equipment, personnel, items, supplies and services covered (all on the same schedule).

• The agreement is between a physician (or physician organization) and a hospital or unrelated physician organization.

• Predominantly for provision of **evaluation and management** (“E&M”) services to patients.

• Any **equipment** covered is located in the **same building** and not used to furnish DHS except as **incidental to the E&M services**.
  – Cannot include advanced imaging equipment, radiation therapy equipment or pathology lab equipment (except for equipment for CLIA-waived tests).
Stark Law –

Timeshare Arrangements Exception

- The arrangement is **not conditioned on referral of patients** by the physician.
- The rental fee is **set in advance** and consistent with **fair market value**.
- Rental charges over the term of the agreement are not determined:
  - In a manner that takes into account the volume or value of referrals or other business generated between the parties; or
  - Using a formula based on (1) a percentage of the revenue raised, earned, billed, collected, or otherwise attributable to the services performed or business generated in the office space; or (2) per unit of service rental charges that are not time-based, to the extent that such charges reflect services provided to patients referred by the lessor to the lessee.
- The arrangement must be **commercially reasonable** even if no referrals were made between the parties and must not violate the Anti-Kickback Statute.
- The arrangement **does not convey a possessory leasehold interest** in the office space that is the subject of the arrangement.
Fair Market Value – Leases

• With respect to rentals and leases “fair market value” means the value of rental property for general commercial purposes (not taking into account its intended use).

• The value may not be adjusted to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor, when the lessor is a potential source of patient referrals to the lessee.

• For purposes of this definition, a rental payment does not take into account intended use if it takes into account costs incurred by the lessor in developing or upgrading the property or maintaining the property or its improvements.
Case Examples – Consequences for Non-Compliance
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West Penn Allegheny Health System (“West Penn”) Settlement: March 2014

• The United States alleged that West Penn, a hospital-landlord, leased space to physicians-tenants at below market rates to induce referrals of patients to West Penn. As a result, improper claims were submitted to federal health care programs.

• Total Amount of Settlement: $1,529,281.50
Case Examples – Consequences for Non-Compliance

Intermountain Healthcare Settlement: April 2013

• Intermountain Healthcare self-disclosed various potential violations of the Stark and Anti-Kickback statutes. With respect to real estate, the potential violations included:
  – Failure to renew several leases over a ten year period; and
  – 18 leasing arrangements with physicians without written or executed lease agreements.

• Total Amount of Settlement: $25,500,000.00
Case Examples – Consequences for Non-Compliance

HCA, Inc. Settlement: September 2012

• Case involved violations of the Stark Statute and the False Claims Act.

• With respect to real estate, subsidiaries of HCA, a hospital-tenant, leased space from Diagnostic Imaging Services of Chattanooga, a physician-landlord, at a rate far in excess of fair market value.

• Total Amount of Settlement: $16,500,000.00
Common Lease Scenarios
Common Issue #1: 
*Minimum 1-year Term Requirement*

**Example #1:**
At the end of a 3 year lease term, physician-tenant advises hospital-landlord of physician-tenant’s desire to extend the lease term for 6 months.
Common Issue #1:  
Minimum 1-year Term Requirement

Example #1 cont’d:

STOP  
Amending the existing lease to extend the term for 6 months would not satisfy the “one year term” requirement.

GO  
Amend the lease to extend the term for 1 year. The amendment may include the right for either party to terminate (with or without cause) during the extended 1 year term.

YIELD  
If the lease is terminated during the 1 year term, the parties may not enter into a lease for any portion of the same space during the 1 year term.

YIELD  
If the lease amendment does not include a termination right, the parties may still terminate the lease during the 1 year term provided that the termination is commercially reasonable. Commercial reasonableness may dictate that a termination fee and a fair market value appraisal would be required for the termination of the lease.
Example #2:
Physician-tenant exercises a termination right under a lease with a hospital-landlord during the first 6 months of a 1 year lease term. Physician-tenant desires to enter into a lease with the same hospital-landlord for space in a different building owned by hospital-landlord.
Example #2 cont’d:

Entering into a lease for completely different space prior to the end of the first year of a lease term (or extended lease term) is permitted.

Consider the facts underlying the situation giving rise to the termination of the existing lease and the execution of a new lease. Is this commercially reasonable?
Common Issue #1:  
*Minimum 1-year Term Requirement*

**Example #3:**  
After the expiration of a 3 year lease term, a physician-tenant holds over for 7 months under a lease with a hospital-landlord.
Common Issue #1:  
*Minimum 1-year Term Requirement*

**Example #3 cont’d:**

*GO*  
Holding over beyond the lease term is permitted even if the physician-tenant holds over for a period of less than 1 year.

*YIELD*  
The holdover tenancy must be on the same terms as the expired lease, subject to any rental premium rate that is set forth in the original lease.
Common Issue #1: 
Minimum 1-year Term Requirement

Example #3 cont’d:

If the existing lease states that the holdover rental rate will be at a specified premium rate the hospital-landlord must charge the premium rate during the holdover period.

If the existing lease states that the premium holdover rate is discretionary (landlord “may” charge a premium rental rate vs. the rental rate “shall be” a premium rental rate), the landlord-hospital is permitted, but not required, to charge the premium rental rate.

The rental rate during the holdover period must not be below fair market value.
Common Issue #2:
*Fair Market Value Requirement and Concessions*

**Example #1:**
Physician-tenant presents hospital-landlord with a copy of a letter of intent summarizing lease terms offered by the another landlord in a different market (or even just a different building). Physician-tenant asks hospital-landlord to match the lease terms proposed by the other landlord.
Common Issue #2:
*Fair Market Value Requirement and Concessions*

**Example #1 cont’d:**

Hospital-landlord must do an independent evaluation of whether the lease terms are consistent with fair market value. Fair market value may vary from market to market and building to building.
Common Issue #2: *Fair Market Value Requirement and Concessions*

**Example #2:**
Hospital-landlord and physician-tenant have agreed upon a rental rate that is consistent with fair market value. Physician-tenant requests that hospital-landlord provide the following concessions: 6 months free rent and a tenant improvement allowance for building out physician-tenant’s suite.
Example #2 cont’d:

Hospital-landlord may only provide concessions that are consistent with fair market value. The hospital-tenant’s evaluation of fair market value and commercial reasonableness must take into consideration any inducements including concessions such as rent abatements and tenant improvement allowances.
Common Issue #2:
*Fair Market Value Requirement and Concessions*

**Example #3:**
The cost of physician-tenant’s desired build-out will exceed the tenant improvement allowance that is consistent with fair market value. Physician-tenant requests that hospital-landlord cover the additional cost as a lease concession.
Common Issue #2: 
Fair Market Value Requirement and Concessions

Example #3 cont’d:

Providing an excessive tenant improvement allowance would be impermissible as it would cause the rental charges not to be consistent with fair market value.

Hospital-landlord can finance the excess tenant improvement costs on commercially reasonable terms. Physician-tenant should execute a promissory note to evidence the obligation and repay the obligation in accordance with the promissory note.
Common Issue #2: 
Fair Market Value Requirement and Concessions

Example #4: 
During the term of a lease between physician-tenant and hospital-landlord, physician-tenant asks hospital-landlord if he can store a few items in the vacant suite next door at no additional charge until the vacant suite is leased.
Common Issue #2:
Fair Market Value Requirement and Concessions

Example #4 cont’d:

Allowing physician-tenant to use storage space at no charge is a violation of the fair market value requirement.

Even if the physician-tenant agrees to pay fair market value for the use of the storage space, the parties should be careful to comply with all other Stark Law and Anti-Kickback Statute requirements.

Enter into a separate agreement for storage space on terms consistent with fair market value.
Common Issue #3:  
*Set in Advance Requirement*

**Example #1:**
During the 6th month of the lease term, physician-tenant advises hospital-landlord of physician-tenant’s desire to lease additional space in the building.
Common Issue #3:  
Set in Advance Requirement

Example #1 cont’d:

Amending the existing lease to add the additional space during the 1st year of the lease term would not satisfy the “set in advance” requirement and would constitute an impermissible amendment to the financial terms of the lease.

Enter into a separate lease agreement for the additional space.

The separate lease agreement may need to include a different rental rate if the fair market value has changed.

The space demised pursuant to the separate lease agreement must be distinct from the space demised pursuant to the existing lease agreement.
Example #2: Hospital-landlord and physician-tenant desire to include a right to expand the premises in the lease agreement.
Example #2 cont’d:

Physician-tenant’s exercise of the expansion right during the 1st year of the lease term (or within 1 year of any amendment to the financial terms of the lease) would violate the “set in advance” requirement and would constitute an impermissible amendment to the financial terms of the lease.

The parties can include the expansion right in the lease, provided that the physician-tenant can only exercise the expansion right:

- After the 1st year of the term, and
- In no event within 1 year following any other amendment to the financial terms of the lease.

Examples of amendments to the financial terms of the lease include:

1. Any change to the rental rate,
2. Any change to the space, and
3. Any other concessions.
Example #3: Physician-tenant and hospital-landlord execute a lease prior to the build-out of premises. The square footage of the premises is estimated in the lease. The parties desire to re-measure the premises and confirm the lease commencement date after build-out is complete.
Common Issue #3: 
*Set in Advance Requirement*

**Example #3 cont’d:**

The lease should specify objective criteria for measurement of the premises and establishment of the commencement date after build out is complete.

Any re-measurement of the premises and corresponding re-recalculation of rent must be done prior to the commencement of the term or after the expiration of the first year of the lease term. If the re-measurement and adjustment occurs during the first year of the lease term, this could be considered an impermissible amendment to the financial terms of the lease.
Example #1:
Physician-tenant desires to enter into a timeshare agreement with hospital-landlord. Physician-tenant is unsure if there is a market for his services, so he wants to start out using the space twice a week for only 6 months, the exact day of the week and time to be determined monthly.
Common Issue #4: Timeshare Arrangements

Example #1 cont’d:

This arrangement would not be permitted under the Stark rental of office space exception or the Anti-Kickback space rental safe harbor, as the 6-month term would not satisfy the “1-year” requirement and the failure to specify the timeshare schedule would not satisfy the “set in advance” requirement.

If physician-tenant desires to use the space for only 6 months and change the scheduled use of the space on a monthly basis, the parties should consider a timeshare license under the new Stark exception since a 1-year term and specific occupancy schedule are not required.

Although the scheduled use under the new timeshare exception may be changed monthly, the “set in advance” requirement still applies. The parties must establish a commercially reasonable mechanism for setting the monthly schedule.

The use of the timeshare space must be used by the physician-tenant predominately for evaluation and management, and the use of equipment must comply with the new Stark timeshare license exception.
Example #2:
Physician-tenant enters into a timeshare agreement with hospital-landlord in compliance with the Stark rental of office space exception and the Anti-Kickback space rental safe harbor for the exclusive use of an medical office suite on Mondays and Thursdays from 8:00 a.m. to 12:00 p.m. 8 months into the term, the physician desires to change the timeshare schedule from Monday and Thursday to Monday and Wednesday.
Common Issue #4: Timeshare Arrangements

Example #2 cont’d:

Physician-tenant’s request to modify the timeshare schedule is an amendment to the financial terms of the lease, which cannot occur within the first year of the term (or within 1 year following any financial amendment) under the traditional office rental exception and safe harbor. Hospital-landlord may not accommodate this request.

The parties may enter into an amendment to the lease modifying the timeshare schedule at any time after the first year of the term.

Alternatively, if the physician-tenant is providing predominately evaluation and management services to patients and the use of equipment is compliant with the new Stark timeshare license exception, an amendment to the timeshare agreement may be permitted during the first year under the new Stark timeshare license exception.

If the physician-tenant is using the space primarily for the use of imaging equipment or certain other health services, the timeshare license would not fit within the new Stark timeshare exception.
Preventive Measures/Best Practices

• **Training.** Provide appropriate training to property managers or leasing professionals responsible for medical real estate leasing to facilitate recognition of potential issues and to identify applicable arrangements which require further review by a trained attorney with a more detailed understanding of requirements of the health care laws.

• **Assume Stark Applies.** If you represent a healthcare system or provider, assume all leasing arrangements could be subject to Stark unless expressly demonstrated otherwise.

• **Fair Market Value Appraisal or Opinion.** Obtain a fair market value opinion letter or appraisal confirming the terms of a respective transaction are within fair market value.

• **Protocols.** Implement standard leasing protocols, and then follow these protocols.
Preventive Measures/Best Practices

• **Savings Clause.** Include a “savings clause” in all leasing agreements.

• **Written Communications.** Be extremely careful what you put in writing, especially in emails and other casual correspondence.

• **Inform.** If you represent a healthcare system or provider, it is important to proactively alert physician tenants of commonly applicable limitations that Stark or Anti-Kickback may impose on their leasing transaction in order to properly set their expectations.

• **Record keeping.** Keep good records of all leasing transactions.

• **Adhere to the Lease.** Do not depart from the written lease terms.
Questions and Answers

Please email your questions to: jkirschnick@bakerlaw.com