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## INVESTMENT OPPORTUNITIES FOR PHYSICIANS




Over the past year, there have been many regulatory changes made by the Centers for Medicare and Medicaid Services in the Phase III final regulations of the Stark Law ("Stark III") and in the 2008 Medicare Physician Fee Schedule proposed and final rules (the "2008 Fee Schedule"). The 2008 Fee Schedule's limitations on reimbursement for diagnostic tests and its prohibitions on an independent diagnostic testing facility sharing its facility with another Medicare provider or supplier have made investment in certain health care ancillaries, such as imaging equipment and anatomic pathology labs, less attractive to physicians. However, numerous investment opportunities continue to exist.

### Ambulatory Surgical Centers

Neither Stark III nor the 2008 Fee Schedule has imposed restrictions upon a physician's ability to invest in ambulatory surgical centers ("ASCs" collectively, "ASC" individually). ASC services are not designated health services covered by the Stark law. The Stark law, in the absence of an applicable exception, prohibits a physician from referring a Medicare or Medicaid patient to an entity in which he, or an immediate family member, has a financial interest for the provision of any of 11 designated health services.

Investment in an ASC, however, must comply with the federal Anti-Kickback statute's safe harbor provisions. The Anti-Kickback statute (the "Anti-Kickback Statute") prohibits anyone from offering, paying, soliciting or receiving any remuneration in exchange for the referral of Medicare or Medicaid business. The Anti-Kickback Statute contains certain exceptions, known as safe harbors, which allow conduct that would otherwise violate the statute (collectively "Safe Harbors", individually "Safe Harbor"). The Safe Harbor for investments in ASCs has four categories: surgeon owned ASCs; single specialty ASCs; multi-specialty

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ASCs; and hospital/physician ASCs. Safe Harbor protection requires full compliance with all of the standards of any one category. The standards require, in part, that each physician investor (1) be in a position to refer patients directly to the ASC and perform surgery on such referred patients; (2) derive at least one-third of his medical practice income from procedures he performs at the ASC and (3) perform at least one-third of the procedures that may be performed in an ASC setting at the investment entity ASC if the investment is in a multi-specialty ASC (the "ASC Safe Harbor").

### **Medical Space/Medical Equipment Leasing Companies; Management Companies**

Medical space/medical equipment leasing companies and medical management companies continue to present investment opportunities for physicians. Typically, a leasing company will either own or lease space and/or equipment and will lease, or sublease, the space and/or equipment to a health care facility. In return for the lease or sublease of the space and/or the equipment, the health care facility will pay the leasing company a rental fee. A management company will manage a health care facility by performing tasks such as billing, collecting, accounting, hiring and firing of personnel on behalf of the health care facility. In exchange for its performance of management functions, the health care facility will pay the management company a management fee.

There are no restrictions on the physician specialty that can invest in a medical space/medical equipment leasing company or in a medical management company. As noted earlier, under the ASC Safe Harbor, physicians who want to invest in an ASC must be in a position to refer patients directly to the ASC and perform surgery on such referred patients. It follows that primary care physicians are not permitted to invest in ASCs. However, even though a primary care physician cannot invest in an ASC, he can invest in (1) a medical space leasing company that owns or leases the building in which the ASC is located and that leases or subleases the space to the ASC; (2) a medical equipment leasing company that owns or leases equipment, such as MRIs and CTs, to the ASC and (3) a medical management company that manages the ASC.

Investments in medical space/medical equipment leasing companies and medical management companies should be structured to fall within the Small Investment Safe Harbor. The Small Investment Safe Harbor requires, in part, that no

more than 40 percent of the investment interests be held by investors who are in a position to make a referral for the entity and no more than 40 percent of the entity's gross revenue may come from referrals or business otherwise generated from investors.

Furthermore, lease agreements between the leasing companies and the health care facilities and the management agreements between the management companies and the health care facilities must be structured to fall within other applicable Safe Harbors and the exceptions to the Stark Law. The applicable Safe Harbors for leases and management agreements and the applicable Stark Law exception for leases require, in part, that the rent under the leases and the management fee under the management agreement be at the fair market value and not be determined in any manner that takes into account the volume of patients referred to a health care facility by a physician owner of the leasing company or the management company.

## **Hospitals**

Hospitals may present viable investment opportunities for physicians; however, investments in hospitals should be structured to fall within applicable Safe Harbors, such as the Small Investment Safe Harbor and Stark Law exceptions. The Stark Law has an exception, known as the "whole hospital exception," that permits a physician to refer his Medicare or Medicaid patient for the provision of any of 11 designated health services to a hospital in which he has an ownership interest if the referring physician is authorized to perform services at the hospital and the physician's ownership is in the entire hospital and not merely a distinct part of department of the hospital.

It is worth noting that Congress continues to focus on physician-owned hospitals. Members of the Senate have stated that they expect to introduce legislation that would eliminate the whole hospital exception entirely, thus preventing physicians from referring their Medicare/Medicaid patients to hospitals in which they have ownership interests. Members of the House of Representatives have passed legislation that greatly restricts a physician's ability to invest in a hospital to which he refers Medicare or Medicaid patients. The House legislation, known as the Paul Wellstone Mental Health and Addiction Equity Act (the "Wellstone Act") was passed on March 3, 2008. The Wellstone Act eliminates the whole hospital exception for hospitals that do not have physician ownership and Medicare provider agreements as of the date of its enactment and limits physician ownership

in existing hospitals to no more than 2 percent, individually and 40 percent in the aggregate. However, to date, no changes have been made to the whole hospital exception and it continues to allow physician investment in hospitals. In addition to ASCs, medical space/medical equipment leasing companies and medical management companies and hospitals, hospices, physical therapy clinics and home health agencies continue to present investment opportunities for physicians. Investment in any of these entities, though not restricted by the 2008 Fee Schedule or Stark III, should be structured to fall within applicable Safe Harbors and exceptions to the Stark Law.

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