

# LOANS TO MEDICAL PROFESSIONALS

## Don't Fear the Physicians

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Most people, when they were young, did not enjoy going to their doctor's office because it was a scary place. Shots, blood tests, people walking around in white coats with strange instruments hanging around their necks.

Years later, some lenders are still afraid--afraid of lending money to physicians because a physician practice is subject to scary laws. Stark II, Anti-Kickback, False Claims Act, Antitrust laws are just the tip of the iceberg as to what regulations can be applicable to a physician practice. Since some lenders don't fully understand these state and federal laws, they are concerned whether repayment of their funds is secured. Should they lend to a physician who is going to invest, for example, in an ambulatory surgery center or an imaging center?

The federal government is constantly issuing new rules and guidance on how physicians and other medical providers can enter into business ventures. The primary rules governing a physician's ability to enter into business ventures are controlled by the federal anti-referral and anti-kickback laws.

**Anti-referral Laws.** The federal anti-referral law, 42 U.S.C. 1395nn *et seq.* (also known as "**Stark II**") specifically governs the delivery of designated health services ("**DHS**") by physicians. Stark II prohibits a physician from referring Medicare referrals to an entity that delivers DHS if the physician has an ownership interest in, or compensation arrangement with such entity. DHS are defined by the U.S. Department of Health and Human Services ("**DHHS**") through the Centers for Medicare and Medicaid Services ("**CMS**"). CMS has listed ten services which meet the DHS definition. Notwithstanding these prohibitions, Stark II has numerous "**Exceptions**" to the physician referral prohibition, which allow physicians to legally enter into business ventures.

**Anti-kickback Laws.** The Federal Anti-kickback Statute codified in 42 U.S.C. 1320a-7(b), prohibits knowingly and willfully soliciting, receiving, offering or paying anything of value to induce referrals of items or services payable by a federal health care program. To guide providers in entering into business arrangements, DHHS, through the Office of the Inspector General ("**OIG**"), has published "**Safe Harbors**" that identify certain business and payment practices which are deemed not to violate federal anti-kickback provisions. Unlike the Stark II Exceptions, if a business venture does not meet all of the required elements of a Safe Harbor, this does not make the business venture *per se* illegal.

Depending on the facts and circumstances, a lender can be assured that its collateral will not be subjected to seizure by the government if the business venture meets the elements of a particular Exception or Safe Harbor. The collateral from a physician business venture can vary, but it often consists of the accounts receivable from the business venture. Lenders that are considering a loan to a physician joint venture should require that the governing documents of the entity meet and maintain the applicable rules. Without these provisions, a lender is putting its money at risk.

There are nearly 50 Stark Exceptions and Safe Harbors that allow physicians to legally enter into agreements. In addition, OIG has issued numerous advisory opinions, open letters and compliance guides. Based on the overwhelming number of publications by the government, lenders no longer need to fear physicians and can find a comfort level when making loans to physicians.

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