

PHYSICIAN PRACTICE ACQUISITION STRATEGY: CMS STARK ADVISORY OPINION OFFERS ADDITIONAL FLEXIBILITY

CMS recently issued a **Stark Advisory Opinion**, which may offer additional flexibility for physician practices in growth mode. CMS-AO-2021-01 concerns a group practice's proposal to furnish designated health services ("DHS") through two wholly owned subsidiary entities that do not, themselves, qualify as group practices. CMS concluded the proposed structure did not preclude the group practice from qualifying as a "single legal entity" as required by the Stark group practice definition. This structure offers certain benefits for private equity and other groups looking to quickly expand and acquire other practices, as well as other strategic opportunities as further described below.

Under the approved structure, the group practice would wholly own two subsidiary entities, each of which provides services (including DHS) to patients. All clinical employees (including physicians) would be employed by the group practice entity. All material assets and business functions of the subsidiary entities would be transferred to the group practice or its manager post-acquisition.

Notably, the subsidiary entities would retain their respective enrollments in Medicare, remain credentialed and contracted directly with payors and health plans and use billing numbers assigned to the subsidiaries to bill Medicare and other payors and health plans for services furnished to their beneficiaries and enrollees. This attribute of the proposed arrangement avoids the need to assign third party payor contracts (to the extent permitted by the payor) or, alternatively, the delay associated with re-credentialing the subsidiary entities or its providers under the group practice, therefore allowing for a faster, more streamlined acquisition transition. Importantly, notwithstanding the above and as a condition to qualifying as a single group practice, all revenues and expenses of the subsidiaries would be treated as revenues and expenses of group practice.

In analyzing the arrangement, CMS cited the language of the regulation permitting a group practice that is otherwise a single legal entity to have wholly-owned subsidiary entities. CMS noted that nothing in the regulations or the associated commentary dictates or limits the types of entities that a group practice may own. However, the group practice must primarily provide services of the type provided by a supplier enrolled in Medicare as a clinic/group practice and billed to Medicare in accordance with Medicare billing guidance for physician services. CMS cautioned that as wholly owned subsidiaries of an operating physician practice, the subsidiaries would not qualify as group practices for purposes of Stark.

PRACTICAL TAKEAWAYS

- CMS approved a legal structure that avoids the need to assign and/or recredential a target medical practice's existing payor contracts or its providers. This may present an opportunity to accelerate and streamline this significant timing aspect of practice acquisitions.
- Given that this model requires the acquisition of stock/equity (as opposed to assets), the proposed structure would necessarily bring along liabilities of the prior practice, including those related to employment, taxes and billings and collections. In addition to customary representations and warranties, the due diligence review process will be critical including a comprehensive claims audit of any acquisition target.
- This subsidiary model would allow an entity to create a subsidiary formed in another state to address situations where that other state is not contiguous to the "parent" practice and/or the "parent" practice cannot operate in that state under that state's corporate laws (but the parent entity must confirm any state-specific requirements regarding physician owners are met).
- This subsidiary model could address issues where an asset acquisition would trigger certificate of need review and approval but a stock/equity transfer would not.
- This subsidiary model would facilitate the creation of a subsidiary to contract with a payor for a payor program in which only a subset of the "parent" practice will participate.
- Parties looking to deploy this structure must still ensure the "parent" practice qualifies as a group practice, as CMS has made clear that the subsidiary entities will not themselves qualify for such treatment under Stark.

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