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Nashville Wealth

Created and Destroyed By Federal Rules and Regs

On March 25, 2004, the Centers for Medicare and Medicaid Services ("CMS") issued another of its "final" regulations, this one interpreting and applying the Stark Law.

While the average person may yawn and switch channels at this news, Nashville's vast and growing healthcare services industry certainly noticed.

That's because few things influence Nashville's wealth and economic prospects these days as much as the state of healthcare, and few things influence healthcare as much as the healthcare reimbursement rules and regulations promulgated by the federal and state governments.

Whole companies, which today are vital engines of employment and wealth creation in Nashville, were built by crafty entrepreneurs on otherwise-overlooked footnotes to the nation's healthcare rules and regs.

The new rules, carrying the oxymoronish monicker "Phase II, Interim Final Rules," are designed to interpret and apply the Stark Law prohibiting certain physician referrals to entities with which they have a financial relationship. The Phase II Rules complete the rules making process implementing Section 1877 of the Social Security Act, commonly referred to as "The Physician Self Referral Law" or the "Stark Law," named after Congressman Pete Stark (D-CA.)

For example, the new rules revise the "same building" test under the in-office ancillary services exception. The new rules provide greater flexibility and are

designed to be clearer.

Under the "same building test," a physician or group practice—let's say an orthopedic or nephrology practice—may refer business to themselves if certain tests are met. One of those tests has been that the service must be provided in the "same building" as the physician's own offices. The new rule expands the definition of "same building."

Where do dialysis patients go to get treatment? Usually wherever their doctor directs. Few docs, however, have the time or expertise to set up a dialysis clinic for themselves. Bingo! Enter the clever entrepreneur who recognizes the opportunity to set up a clinic for the physician, operate and manage it, and share the profits.

But, wait. There's a problem. Those pesky Rules prohibit sharing of profits with anyone other than a physician if physicians refer patients to a business providing ancillary services to their patients.

So do it as a management fee, says the wily entrepreneur. Now you've got a business. The physician churns out the patients who require the services. He sends them to his own clinic. The patient is all too happy to do what the doc says. The entrepreneur gladly does all the work of operating the clinic and making sure it all works profitably. He receives a management fee. The doc keeps the profits.

Everybody benefits and a new business is born. Even the patients benefit because the physician is closer at hand and can provide more personalized oversight.

To make all this legal under the Rules, however, the clinic must meet certain tests. The most notable of these is known as the "same building" test. The new Rules expand the interpretation of

this exception and clarify other aspects. These new exceptions and clarifications create new business opportunities or make old ones more or less feasible or profitable.

And so goes the eternal game being played by Nashville's healthcare community. Find the opportunity and exploit it. Understand the Rules and build a business on the loopholes. Buried in the Rules are a veritable cornucopia of potentially profitable opportunities.

What goes up can also come down, however.

These periodic new rules and interpretations of rules can also have an immediately adverse effect on existing healthcare companies that set up businesses in good faith. They use the rules in effect at the time, only to find the rules are changed literally right under them at some later date.

Ask the home healthcare industry if government rules changes can have an effect on profitability—or even on viability. Or ask your neighbor, the CEO of that healthcare company, about what happened post-1997 when the infamous BBA went into effect. The Balanced Budget Act of 1997 killed off more than a few Nashville healthcare companies and severely crippled many others for years.

The tricky part is that healthcare businesses are often dependent on footnotes in Rules issued by bureaucrats in Washington or the fifty state capitals. Favorable footnote: instant wealth. Unfavorable footnote: hello bankruptcy. Moral for Nashville's healthcare community and budding entrepreneurs: read the rules.

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