



# MSBA

LEGAL SUMMIT &  
**ANNUAL MEETING**

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**June 13-16, 2018**

Ocean City, MD

# Major Issues in Selling/Buying Medical/Dental Practices (Legal, Valuation, Financing)

Speakers:

## Kamkari Healthcare Law

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## Sandy Spring Bank

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# **I- Preliminary Issues:**

▶ **A- Current Trend-**

▶ **B- Benefits to Parties**

**1-Seller**

- a- **Seller(s) Usually Retiring; or**
- b- **Consolidation of Offices**
- c- **Value Built into the Practice**

**2-Buyer**

- a- **Buyer(s) Usually Starting New Practice; or**
- b- **Expanding Their Practice**
- c- **Predictability**

- i- **Business-Min Business Risks; Proven Track**

**Record of Revenues/Profits**

- ▶ ii- **Legal**

## **II- Attorneys' Various Roles:**

- ▶ **A- Business Negotiator- Business Terms**
- ▶ **B- Commercial Transactions Attorney**
- ▶ **C- Healthcare Law Attorney**
- ▶ **D- Tax Knowledge/Consequences**

# Letter of Intent

- ▶ **A- Non-Binding Terms**
  - ▶ **Terms of the Deal**
    - ▶ **Structure of the Transaction**
    - ▶ **Purchase Price**
    - ▶ **Offer(s) of Employment**
- ▶ **B- Binding Terms**
  - ▶ **No-shop Provision**
  - ▶ **NDA- Confidentiality of Seller's & Buyer's Info.**

# III- Purchase Price

- ▶ **A- Valuation**
  - ▶ **Gross-Revenue Model**
  - ▶ **Net-Profit Model**
- ▶ **B- Allocation of Purchase Price**
  - ▶ **Each Asset**
  - ▶ **Goodwill**

## III- Stock Purchase v. Asset Purchase

### ▶ General Differences

#### ▶ A- Asset Purchase

- ▶ 1- Buying Certain Assets
- ▶ 2- Accepting Certain Liabilities

#### ▶ B- Stock Purchase

- ▶ 1- Buying All Assets
- ▶ 2- Accepting All Liabilities  
Past/Present/Future

## Advantages of Asset Purchase

- ▶ **A- Only Certain Liabilities**
- ▶ **B- If Purchase Price exceeds aggregate tax basis of assets, Buyer receives a stepped-up basis equal to the purchase price**
- ▶ **C- By purchasing assets, the buyer avoids the problems presented by minority shares who refuse to sell their shares**
- ▶ **D- Normally no Securities Laws**
- ▶ **E- Goodwill Tax Consequences**



# Disadvantages of Asset Purchase

- ▶ **A- Re-title Assets in Name of Buyer**
- ▶ **B- Buyer has to sign new K with 3<sup>rd</sup> parties for non-assignable Ks.**
- ▶ **C- Avoid Transfer Taxes in States That Impose Them**
- ▶ **D- Stock Transfers can be a simpler Transaction**

## **IV- Transition Period**

- ▶ A- Length of Stay**
  
- ▶ B- Compensation**
  - ▶ 1- Stark Law**
  - ▶ 2- Anti Kickback Statutes**

## V- Due Diligence:

- ▶ A- Commercial Due Diligence
- ▶ B- Healthcare Due Diligence
- ▶ C- Antitrust Due Diligence- (Possibly)

# Commercial Due Diligence

- ▶ **A- Business Docs- Bylaws, Articles, Minutes/Res.**
- ▶ **B- UCC Filing**
- ▶ **C- Lease**
- ▶ **D- Licenses-Disciplinary Actions**
- ▶ **E- Employment Contracts**
- ▶ **F- Judgments**
- ▶ **G- Possible Property Issues**

# Healthcare Law Due Diligence

- ▶ **A- Stark Law**
  - ▶ Lease
  - ▶ Employment K.
  
- ▶ **B- Anti Kickback Statute**

## Antitrust Due Diligence- (Possibly)

- ▶ **A- In “bigger” deals**
- ▶ **B- smaller markets**

## **VI- Stark Law**

- ▶ **A. Prohibits “self-referring” physicians**
- ▶ **B. “Designated Health Services” - Certain services not all services**
- ▶ **C. for Medicare and Medicaid patients**
- ▶ **D. Prohibits the facility to bill for DHS; broader than getting paid)**
- ▶ **E. Exceptions- Certain services are exempt provided they were offered/delivered at FMV**

# Self-Referring Physicians

- ▶ **A. Refer Patients**
- ▶ **B. owner, partner, shareholder (or immediate family member)**
- ▶ **C. investment**
- ▶ **D. Remuneration-referral fee or structured payment**



# DHS

- ▶ **A. Clinical laboratory services**
- ▶ **B. Physical therapy services**
- ▶ **C. Speech-language pathology services**
- ▶ **D. Radiology, radiation therapy services**
- ▶ **E. Durable medical equipment and supplies**
- ▶ **F. Occupational therapy services**

**(Full List in Handout)**

## Exceptions (Require FMV)

- ▶ **A. Personal services**
- ▶ **B. In-office ancillary services**
- ▶ **C. Rental of office space and equipment**
- ▶ **D. Physician recruitment**
- ▶ **E. Employment arrangements**
- ▶ **F. Isolated transactions**
- ▶ **G. Indirect compensation**

## Penalties

- ▶ **A. Denial of claim: must refund any payment**
- ▶ **B. Civil monetary penalty: \$15,000 per claim, possible triple damages**
- ▶ **C. Failure to report: \$10,000 per day**
- ▶ **D. Exclusion from Medicare and Medicaid programs**
- ▶ **E. Civil law, strict liability with no “intent” requirement**
- ▶ **F. Excluded from Federal Health Programs**

## **VII- Anti Kickback Statutes**

- ▶ **A. It is a crime to knowingly or willfully:**
- ▶ **B. offer, pay, solicit, or receive remuneration, directly or indirectly;**
- ▶ **C. in cash or in kind;**
- ▶ **D. in exchange for;**
  - ▶ **1- referring an individual; or**
  - ▶ **2- furnishing or arranging for a good or service; and**
  - ▶ **3- for which payment may be made under Medicare or Medicaid**
  - ▶ **4- Unlike Stark Law, Antikick back laws require intent**

## Safe Harbor- Require FMV

- ▶ **A. Personal services**
- ▶ **B, Space and equipment leases**
- ▶ **C. Sale of a medical practice**
- ▶ **D. Practitioner recruitment**
- ▶ **E. Employment agreements**
- ▶ **F. Others**

# Penalties

- ▶ **A. Payments made to reduce the provision of items or services may also trigger CMPs**
- ▶ **B. Fine of not more than \$25,000 or imprisoned for not more than five (5) years or both**
- ▶ **C. Civil Monetary Penalties (CMP):**
- ▶ **The amount of a CMP can range up to \$50,000 for each violation plus the additional imposition of 3 times the amount of the remuneration offered, paid, solicited or received**

## Case Law

### **Tuomey Hospital (4th Cir. 2012)**

**Employment agreement provided compensation package that was designed to pay 131% of professional collections plus full-time benefit for part-time physicians.**

## Case Law

**Halifax Medical Center- qui tam action and gov't intervened**

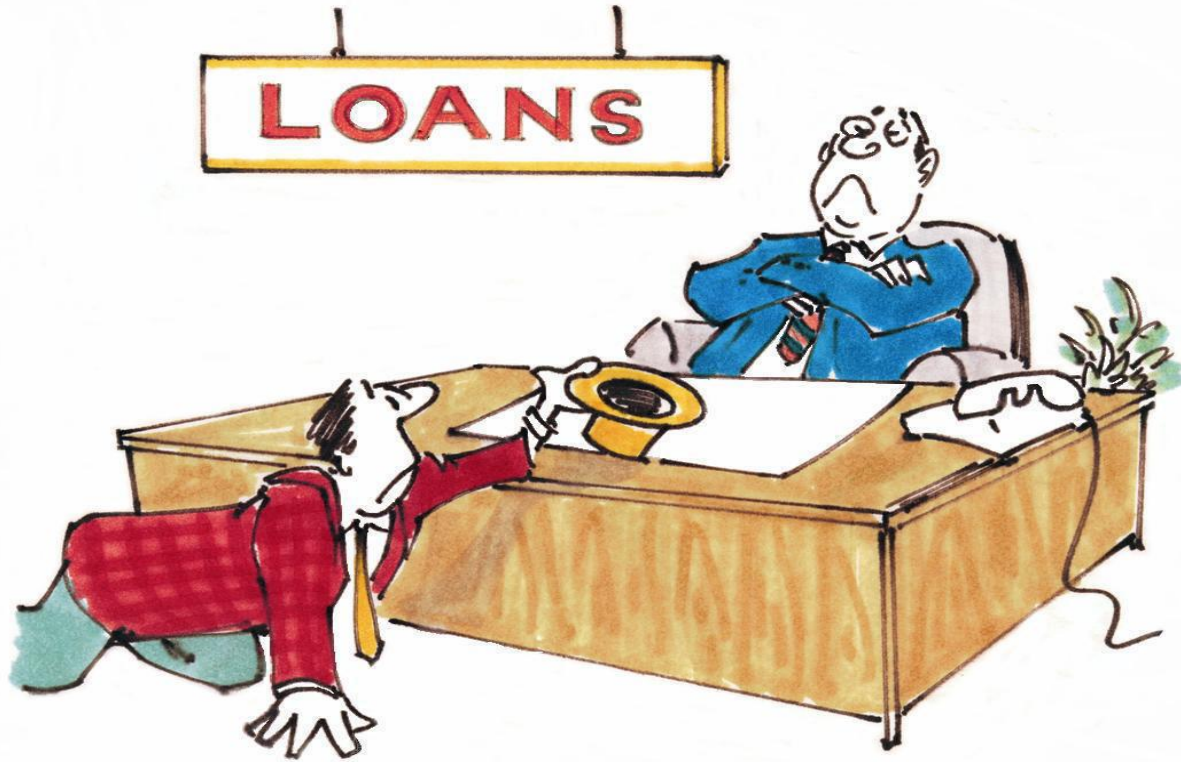
**Again over compensation to physicians that took into account the referrals by physicians**

**Oncology bonus pool included an amount based on operating margin of hospital's oncology program and the overall bonus was over twice the amount of their base salary.**



## Case Law

**U.S. ex rel. Singh v. Bradford- qui tam action/Gov't didn't intervene. Sublease of nuclear camera was inflated even it was a fixed payment because it was intended to compensate referring physicians.**



# Valuation to financing...

Does it make sense to invest in this practice?

- When do the details of the transaction outweigh the financials?
- What causes a gap in financing?
- Importance of the Bank looking beyond the financials

# Why do we ask for so much information?

- Deep analysis of practice financials
  - Is the practice losing revenue and why?
  - Margin of collections
- Purchase Agreement
- Lease
- Background of both seller and borrower/reputation of the practice
- Employment Contracts



# Valuation

- Type of practice - does practice management align? Do skills match or do you have appropriate coverage?
- Concentration of Services - Dentistry, Hygiene, Surgery
- Production - Fee for service, PPO, or HMO, Medicare, Medicaid
- Days worked per week and schedule

# Questions to ask:

- How long will the seller continue to work through the transition?
  - Can negatively affect the cash flow of the transaction
- Is there a non-compete?
  - Buyer and seller
- Age of equipment?
  - Add to the financial burden of the acquisition

## Questions continued...

- Tenure of the employees
- What procedures have been kept in house vs referred out?
- What plan is in place to mitigate attrition post acquisition?
- Does the seller have another office?

Making sure the transaction makes sense for the client builds lasting relationships not just transactions.



# Typical Healthcare Financing Needs

1. Practice Acquisition (5yr, 7yr or 10 yr. term options)
2. Equipment (up to 7 yr. term options)
3. Real Estate (various term/amortization options)

# Documentation needed

- Completed and signed Application/Personal Financial Statement (no digital signatures)
- Two to three years of personal tax returns
- Two to three years of business tax returns (practice being acquired and/or existing practice of the borrower)
- YTD practice financials (P&L and Balance Sheet)

# Documentation needed...continued

- Equipment invoices and/or construction contracts
- Practice Letter of intent or draft purchase agreement
- Copy of existing and draft lease
- Practice Valuation
- Draft employment agreements
- Curriculum Vitae of the Borrower(s)

# Due Diligence

- Insurance (Life, Business Personal Property, Hazard Insurance(real estate), Disability, and Malpractice)
- Valid State License
- Articles of Incorporation and Bylaws (if available)
- 4506-T IRS Verification
- Beneficial Ownership Form – Recent Federal Regulation
- Professional Membership (MSDA, NOVA, and/or ADA)

# Beneficial Owner(s) – New Federal Regulation

## **Certification Regarding Beneficial Owner(s) and Controlling Person of Legal Entity Customers**

**What is the form?** - Requires disclosure of key individuals who own and/or control a legal entity (help the government fight terrorist financing, money laundering, tax evasion, corruption, fraud and other financial crimes)

**Who completes the form? –**

- 1. Beneficial Owner** - Each individual who owns *directly* or *indirectly* 25% or more of the equity interests of the legal entity customer
- 2. Controlling Person** – An individual with significant responsibility for managing the legal entity customer (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer).

# Beneficial Owner(s) – New Federal Regulation

## Certification Regarding Beneficial Owner(s) and Controlling Person of Legal Entity Customers

### I. GENERAL INSTRUCTIONS

#### What is this form?

To help the government fight financial crime, Federal regulation requires certain financial institutions to obtain, verify, and record information about the beneficial owners of legal entity customers. Legal entities can be abused to disguise involvement in terrorist financing, money laundering, tax evasion, corruption, fraud, and other financial crimes. Requiring the disclosure of key individuals who own and/or control a legal entity helps law enforcement investigate and prosecute these crimes.

#### Who has to complete this form?

This form must be completed by the person opening a new account on behalf of a legal entity by U.S. financial institutions, including **Sandy Spring Bank**.

For the purposes of this form, a **legal entity** includes a corporation, limited liability company, or other entity that is created by a public document with a primary U.S. State or similar office, a general partnership, and any similar business entity formed in the United States or foreign country. Legal entity does not include sole proprietorships, unincorporated associations, or natural persons opening accounts on their own behalf.

#### What information do I have to provide?

This form requires you to provide the name, address, date of birth and Social Security number (or passport number or other similar information, in the case of non-U.S. persons) for the following individuals:

- Each individual, if any, who owns, directly or indirectly, 25 percent or more of the equity interests of the legal entity customer - the **Beneficial Owners** (e.g., each natural person that owns 25 percent or more of the shares of a corporation); and
- An individual with significant responsibility for managing the legal entity customer - the **Controlling Person** (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer).

The number of individuals that satisfy this definition of "beneficial owner" may vary. Depending on the factual circumstances, up to four individuals (but as few as none) may need to be identified. Regardless of the number of individuals identified as defined in section (i) above, you must provide the identifying information of one individual as defined in section (ii) above if it is possible that in some circumstances the same individual might be identified under both sections (e.g., the President of Acme, Inc. who also holds a 30% equity interest). Additionally, in some circumstances, based on the type of legal entity, the need for information as defined in section (i) may vary. A completed form will contain the identifying information of at least one individual as defined in section (ii), and up to four individuals as defined in section (i).

The Bank may also ask to see a copy of a driver's license or other identifying document for each person listed on this form.

### II. CERTIFICATION OF BENEFICIAL OWNER(S)

The persons opening an account or maintaining a business relationship on behalf of a legal entity must provide the following information:

A) Name of individual Opening Account:	Title
B) Name of Legal Entity	Entity Type
C) Legal Entity Street Address	City, State, and ZIP/Postal Code

D) The following information for each individual, if any, who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of the legal entity listed above. If no individual meets this definition, please check "Beneficial Owner Not Applicable" below and skip this section.

#### Beneficial Owner Not Applicable

- For a person with a Social Security Number (SSN) or Individual Taxpayer Identification Number (ITIN), provide the SSN/ITIN and leave the Primary ID Type, Number, and Issuing Location blank.
- For a non-U.S. person without a SSN/ITIN, provide a Passport Number and Country of Issuance. In lieu of passport number, a non-U.S. person may also provide an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

Beneficial Owner 1 Information:	% of ownership
Name	Street Address
Date of Birth	Address Line 2
Tax ID Type (SSN or ITIN) and Number	City, State, and Country
Primary ID Type, Number, and Issuing Location	ZIP/Postal Code

Beneficial Owner 2 Information:	% of ownership
Name	Street Address
Date of Birth	Address Line 2
Tax ID Type (SSN or ITIN) and Number	City, State, and Country
Primary ID Type, Number, and Issuing Location	ZIP/Postal Code

Beneficial Owner 3 Information:	% of ownership
Name	Street Address
Date of Birth	Address Line 2
Tax ID Type (SSN or ITIN) and Number	City, State, and Country
Primary ID Type, Number, and Issuing Location	ZIP/Postal Code

Beneficial Owner 4 Information:	% of ownership
Name	Street Address
Date of Birth	Address Line 2
Tax ID Type (SSN or ITIN) and Number	City, State, and Country
Primary ID Type, Number, and Issuing Location	ZIP/Postal Code

E) The following information for one individual with significant responsibility for managing the legal entity listed above, such as an executive officer or senior manager (e.g., Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, Treasurer); or any other individual who regularly performs similar functions. If appropriate, an individual listed under section (D) above may also be listed in this section.

- For a person with a Social Security Number (SSN) or Individual Taxpayer Identification Number (ITIN), provide the SSN/ITIN and leave the Primary ID Type, Number, and Issuing Location blank.
- For a non-U.S. person without a SSN/ITIN, provide a Passport Number and Country of Issuance. In lieu of passport number, a non-U.S. person may also provide an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

Controlling Person Information:	
Name	Street Address
Date of Birth	Address Line 2
Tax ID Type (SSN or ITIN) and Number	City, State, and Country
Primary ID Type, Number, and Issuing Location	ZIP/Postal Code
Title	

#### F) Certification:

I, \_\_\_\_\_ (name of individual listed in A) above, hereby certify, to the best of my knowledge, that the information provided above is complete and correct.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Primary ID Type, Number and Issuing Location: \_\_\_\_\_

Legal Entity Tax Identification Number (TIN) \_\_\_\_\_

# Amount to Finance

- Equipment - up to 100%
- Practice – up to 100%
- Working Capital – based on acquisition price
- Real Estate – multiple variables

# How long does it take?

- Practice - Normally 30-45 days
- Equipment - Normally 5-7 days
- Real Estate - Normally 45-60 days depending on appraisal



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# Thank You!