

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Health Policy

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BILL: SB 108

INTRODUCER: Senator Grimsley

SUBJECT: Financial Arrangements Between Referring Health Care Providers and Providers of Health Care Services

DATE: November 13, 2015      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall	HP	<b>Pre-meeting</b>
2.			BI	
3.			FP	

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**I. Summary:**

SB 108 amends s. 456.053, F.S., the Patient Self-Referral Act (Act), to allow certain investment interests between a health care provider referring a patient for the provision of designated health services<sup>1</sup> and the providing entity. The referring health care provider’s allowed investment interests must be in a publicly held corporation’s registered securities that were purchased on a national exchange or over-the-counter market and meet other specified requirements. The bill provides that this exemption from prohibited referrals may not be used as a safe harbor to contravene other provisions of state law.

The total asset threshold for a publicly held corporation in which a referring health care provider of other health care items or service that are not designated health services may invest is increased from \$50 million to \$75 million.

The bill also amends reporting requirements for health care providers who make referrals that are specifically allowed under the Act.

**II. Present Situation:**

**The Patient Self-Referral Act of 1992**

Section 456.053, F.S., entitled the “Patient Self-Referral Act of 1992” was enacted by the Legislature to safeguard the people of Florida from unnecessary and costly health care expenditures while providing guidance to health care providers on prohibited patient referrals.<sup>2</sup>

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<sup>1</sup> Section 456.053(3)(c), F.S., defines “designated health services” as clinical laboratory services, physical therapy services, comprehensive rehabilitative services, diagnostic-imaging services, and radiation therapy services.

<sup>2</sup> Section 456.053(2), F.S.

A health care provider to whom the Act applies is a physician licensed under ch. 458, 459, 460, or 461, F.S., or any health care provider licensed under ch. 463 or 466, F.S. Allopathic, osteopathic, chiropractic, and podiatric physicians, certified optometrists, and dentists are health care providers under the Act.

The Act has differing limitations and prohibitions on patient referrals depending on the type of health care service to be provided as follows:

- A health care provider may not refer a patient for the provision of designated health services<sup>3</sup> to an entity in which the health care provider is an investor<sup>4</sup> or has an investment interest.<sup>5,6</sup>
- A health care provider may not refer a patient for the provision of any other health care services or items to an entity in which the health care provider is an investor unless:<sup>7</sup>
  - For entities whose shares are publicly traded:
    - The provider's investment interest is in registered securities purchased over a national exchange or over-the-counter market; and
    - The entity's total assets at the end of the last fiscal quarter exceed \$50 million;
  - For entities whose shares are not publicly traded:
    - No more than 50 percent of the value of the investment interests are held by investors in a position to make referrals to the entity;
    - The terms of an investment interest offered to an investor are the same regardless of whether the investor is in a position to make referrals;
    - The terms offered to an investor are not related to the previous or expected volume of referrals; and
    - There is no requirement that an investor refer patients to the entity as a condition for becoming or remaining an investor.
- Entities accepting outside referrals for diagnostic imaging must meet additional conditions including conditions for the physician make-up of the solo or group practice as well as physician performance of diagnostic imaging services, conditions on billing practices, restrictions on contracting with outside providers, and conditions on reporting accepted outside referrals to the Agency for Health Care Administration (AHCA).<sup>8</sup>

A health care provider who has an investment interest in an entity to which he or she refers a patient must disclose such interest to the patient on a written form that details the patient's right

<sup>3</sup> See supra note 1.

<sup>4</sup> Section 456.053(3)(l), F.S., defines "investor" as a person or entity owning a legal or beneficial ownership or investment interest, directly or indirectly, including, without limitation, through an immediate family member, trust, or another entity related to the investor within the meaning of 42 C.F.R. s. 413.17, in an entity.

<sup>5</sup> Section 456.053(3)(k), F.S., defines "investment interest" to include an equity or debt security issued by an entity, including, without limitation, shares of stock in a corporation, units or other interests in a partnership, bonds, debentures, notes, or other equity interests or debt instrument. Certain investment interests are excepted from the definition including an investment interest in a sole provider of health care services in a rural area; an investment interest in the form of certain notes, bonds, debentures, or other debt instruments that matured prior to Oct. 1, 1996; an investment interest in real property resulting in a landlord-tenant relationship between the entity and the referring healthcare provider unless the rent is determined by the volume of referrals; and an investment interest in an entity which owns or leases and operates a hospital or nursing home.

<sup>6</sup> Section 456.053(5)(a), F.S. Offices providing radiation therapy services are exempt from these requirements if they were in business before April 1, 1991. (See s. 456.053(5)(i), F.S.).

<sup>7</sup> Section 456.053(5)(b), F.S.

<sup>8</sup> Section 456.053(4), F.S.

to obtain the services elsewhere along with at least two alternative sources from which the patient could receive the services.<sup>9</sup>

A health care provider found to have violated the Act could be subject to one or more disciplinary actions or penalties including:

- A penalty of up to \$100,000 for each arrangement if a health care provider or other entity enters into an arrangement that has the principal purpose of assuring referrals between the provider and the entity.<sup>10</sup>
- Discipline by his or her appropriate board and hospitals are subject to penalties imposed by the AHCA.<sup>11</sup>
- Being charged with a first degree misdemeanor and subject to additional penalties and disciplinary action by his or her respective board if a health care provider fails to comply with the notice provisions of the Act and s. 456.052, F.S.<sup>12</sup>

A claim for payment for a service provided pursuant to a referral prohibited by the Act may not be made and any such payments received must be refunded. Additionally, any person who knows or should know that such a claim is prohibited and who presents or causes to be presented such a claim, is subject to a fine of up to \$15,000 per service to be imposed and collected by that person's regulatory board.<sup>13</sup>

### **The Federal Stark Law**

Generally similar to the Act, the federal Stark Law<sup>14</sup> (Stark) prohibits physicians from referring patients to receive designated health services that are payable by Medicare or Medicaid from entities with which the physician or an immediate family member has a financial relationship, unless an exception applies.<sup>15</sup> Under Stark, designated health services include:

- clinical laboratory services;
- physical therapy, occupational therapy, and outpatient speech-language pathology services;
- radiology and certain other imaging services;
- radiation therapy services and supplies;
- durable medical equipment and supplies;
- parenteral and enteral nutrients, equipment, and supplies;
- prosthetics, orthotics, and prosthetic devices and supplies;
- home health services;
- outpatient prescription drugs; and
- inpatient and outpatient hospital services.<sup>16</sup>

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<sup>9</sup> Sections 456.053(5)(j) and 456.052, F.S.

<sup>10</sup> Section 456.053(5)(f), F.S.

<sup>11</sup> Section 456.053(5)(g), F.S.

<sup>12</sup> Section 456.052(3), F.S.

<sup>13</sup> Section 456.053(5)(c)-(e), F.S.

<sup>14</sup> 42 U.S.C. s. 1395nn

<sup>15</sup> U.S. Dept. of Health & Human Services, Office of the Inspector General: *A Roadmap for New Physicians: Fraud and Abuse Laws*, available at <http://oig.hhs.gov/compliance/physician-education/01laws.asp>, (last visited Sep. 14, 2015).

<sup>16</sup> 42 U.S.C. s. 1395nn(h)(6). When compared to Florida law, it can be seen that the list of designated health services under Stark includes the services listed as designated health services under the Act but also includes additional services not included in Florida law.

The Stark law is a strict liability statute, which means proof of specific intent to violate the law is not required. Stark prohibits the submission, or causing the submission, of claims in violation of the law's restrictions on referrals. Penalties for physicians who violate Stark include fines as well as exclusion from participation in the Federal health care programs.<sup>17</sup>

Exceptions to the Stark's self-referral prohibitions include:

- Exceptions for certain services including:
  - Most referrals of a patient for physician's services and in-office ancillary services provided by the same physician or another physician in the same group practice; and
  - Referrals for services furnished by an organization that has a contract with an health maintenance organization or a prepaid health plan.<sup>18</sup>
- Exceptions related to ownership or investment interests including:
  - Ownership of investment securities that are publically traded and held in a corporation with equity exceeding \$75 million on average during the previous three fiscal years and which were purchased on terms generally available to the public; and
  - Ownership of shares in an investment company if the company has total assets exceeding \$75 million on average during the previous three fiscal years.<sup>19</sup>
  - Ownership of certain hospitals including hospitals in Puerto Rico, in rural areas, and certain hospitals in which the referring physician is authorized to perform services.<sup>20</sup>
- Exceptions related to other compensation arrangements including:
  - The rental of office space or equipment with terms that are consistent with fair market value and without consideration of any past or future referrals made between the parties;
  - Bona fide employment relationships with remuneration that does not take into account the volume or value of referrals by the referring physician;
  - Personal services arrangements with terms that do not exceed fair market value and do not take into account the volume or value of any referrals or other business generated between the parties;
  - Physician incentive plans if no specific payment is made to reduce or limit medically necessary services provided with respect to a specific individual enrolled with the entity;
  - Remuneration provided by a hospital to a physician that is unrelated to designated health services;
  - Physician recruitment bonuses paid by a hospital that do not take into account the volume or value of referrals;
  - Certain isolated transactions;
  - Certain group practice arrangements made with hospitals that began before December 19, 1989; and
  - Payments made by a physician for laboratory services or other items or services if paid at fair market value.<sup>21</sup>

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<sup>17</sup> See supra note 15

<sup>18</sup> 42 U.S.C. s. 1395nn(b)

<sup>19</sup> 42 U.S.C. s. 1395nn(c)

<sup>20</sup> 42 U.S.C. s. 1395nn(d)

<sup>21</sup> 42 U.S.C. s. 1395nn(e)

## **Additional Restrictions on Agreements between Referring Health Care Providers and Providers of Health Care Services**

### ***Federal and State Anti-Kickback Statutes***

Both Florida and Federal law include a prohibition on providing any sort of kickback for the referral of patients from a health care provider to a licensed facility. Section 395.0185, F.S., prohibits any person from paying a commission, bonus, kickback, or rebate or engaging in any form of split-fee arrangement with a physician, surgeon, organization, or person for patients referred to a licensed facility. The AHCA is required to enforce the provisions of the law and, if the violator is not licensed by the AHCA, the law authorizes the AHCA to impose a fine of up to \$1,000 nonetheless, and to recommend disciplinary action to the appropriate licensing board. Section 456.054, F.S., prohibits a health care provider or provider of health care services to offer, pay, solicit, or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients.<sup>22</sup>

Federal law also prohibits such payments for the referral of an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made under a Federal health care program.<sup>23</sup> Violating the federal anti-kickback statute makes the violator guilty of a felony which is punishable by a fine of up to \$25,000 or up to 5 years in prison. However, there are several exceptions to the federal statute including, but not limited to:

- Discounts properly disclosed and appropriately reflected in the costs claimed and charges made by the provider or entity;
- Payments between employers and employees for employment in the provision of covered items or services;
- Certain amounts paid to vendors;
- Waivers of co-insurance; and
- The waiver of any cost-sharing provisions by a pharmacy.

### ***Anti-Trust Laws***

Additionally, both Florida and Federal law prohibit price-fixing and unfair trade practices which may be applicable to certain relationships between referring health care providers and providers of health care services. The Florida Deceptive and Unfair Trade Practices Act<sup>24</sup> generally prohibits unfair methods of competition, as well as deceptive acts or practices, in the conduct of trade or commerce. Also, Federal anti-trust laws, including the Sherman Act, generally prohibit unreasonable restraints on fair trade created by contract, combination, or conspiracy.<sup>25</sup>

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<sup>22</sup> Violations of this section are considered patient brokering and are punishable as provided in s. 817.505, F.S., which can include criminal penalties (felony of the third degree) and other civil, administrative, or criminal penalties.

<sup>23</sup> 42 U.S.C. s. 1320a-7b(b)(2)(A)

<sup>24</sup> Section 501.204, F.S.

<sup>25</sup> Federal Trade Commission, *The Antitrust Laws*, available at: <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>, (last visited Sep. 14, 2015).

### III. Effect of Proposed Changes:

SB 108 amends s. 456.053, F.S., to create an exemption to the prohibition on referrals. This will allow certain investment interests between a health care provider referring a patient for the provision of designated health services<sup>26</sup> and entities in which the provider is an investor if such investment interest is in registered securities purchased on a national exchange or over-the-counter market and is issued by a publicly held corporation that:

- Trades shares on a national exchange or over-the-counter market;
- Had total assets of \$75 million or more at the end of the most recent fiscal quarter; and
- Does not loan funds or guarantee a loan to a health care provider who is in a position to make referrals to the corporation if such provider uses any part of the loan to obtain the investment interest.

The bill also:

- Restricts health care providers from using this exemption as a safe harbor to contravene other provisions of state law and requires that exempted investment interests must be purchased without a discount, incentive, gift, or future option;
- Amends the current exemption from the restriction on a health care provider referring patients for the provision of health care items and services other than designated health services to an entity in which the provider has a specified investment interest so that such entity must have \$75 million, rather than \$50 million, in assets at the end of the most recent fiscal quarter;
- Requires health care providers who refer patients for designated health services to providers in which they have an exempted investment interest to disclose such interest to his or her patients; and
- Removes the requirement to disclose such investment interest when referring patients for health care items or services other than designated health services.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

None.

#### C. Trust Funds Restrictions:

None.

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<sup>26</sup> See supra note 1.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

SB 108 may have a positive fiscal impact on health care providers and entities who are currently restricted from referring patients, or accepting patient referrals, if an investment interest exists. Health care providers will be able to invest in publicly held corporations through publicly regulated exchanges similar to any other private investor and allow for more diversity in their personal portfolios.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

Lines 143-147 of the bill require the disclosure of investment interests by health care providers who refer patients for the provision of designated health services and to entities in which they have investment interests that are in compliance with one of the exceptions under paragraphs (a), (b), or (j). However, paragraph (b) only lists exceptions for investment interests that apply to the provision of items or services that are not designated health services. As such, the bill should be amended to remove the reference to designated health services on line 145 or to remove the reference to paragraph (b) on line 147.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 456.053 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.