



Legal Update

TORCH Fall Conference

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Reed +
Claymon

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QIPP OVERVIEW

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QIPP

- Quality Incentive Payment Program
- Supplemental payment program for nursing facilities
- Encourages nursing facilities to improve the quality and innovation of services
- Uses Medicare and Medicaid 5-star rating system to measure success

Overview

- Year 3 begins September 1, 2019
 - The eligibility period runs from September 1, 2019 through August 31, 2020
 - CHOWs for QIPP Year 4 will likely be due in February 2020
- Legislatively directed, renewed annually by HHSC and CMS

QIPP 3 Structure: General

- HHSC held a series of workgroup meetings in June, July and August 2018 related to QIPP
- Final rules published in Texas Register on December 30, 2018
- Changes include:
 - New quality metrics
 - New eligibility requirements
 - New financing components
- \$600 MM cap (increase from ~\$446 MM in FY 2019)
 - QIPP dollars will be limited by 1115 waiver budget-neutrality capacity and the amount of intergovernmental transfer (IGT) funds available for the program
- 8% IGT reserve (reduction from current 10%)
- Slight reduction in MCO fees

QIPP 3 Structure: Eligibility

- QIPP is open to two (2) classes of NFs:
 - Non-state government-owned (NSGO) NFs
 - Eligibility for NSGO NFs was expanded beyond NFs that are located in the same Regional Healthcare Partnership (RHP) or within 150 miles of the NSGO
 - Eligibility can be demonstrated by...
 - (i) ownership of the NF by the NSGO for no less than four years prior to the first day of the eligibility period (August 31, 2015), or
 - (ii) by certification in connection with the enrollment application that the NF can demonstrate an active partnership between the NF and the NSGO that owns the NF.
 - Criteria that demonstrate an active partnership between the NF and the NSGO that owns the NF are (1) monthly meetings (in-person or virtual) with NF administrative staff to review the NF's clinical and quality operations and identify areas for improvement, (2) quarterly joint trainings on topics and trends in nursing home care best practices or on needed areas of improvement, and (3) annual, on-site inspections of the NF by a NSGO-sponsored Quality Assurance team.
 - Privately-owned NFs
 - The eligibility criteria for private NFs was expanded
 - the percentage of Medicaid NF days of service that a private NF must meet or exceed to participate in the QIPP was set at **65 percent** of historical Medicaid NF days of service provided under fee for service (FFS) and managed care compared to the NF's total days of service.

Capitation Rate Components

Component One* - QAPI

- Monthly, 1 metric (110% of non-federal share)

Component Two – Workforce Development

- Monthly, 3 metrics (30% after C1 and C4)

Component Three – MDS Quality Metrics

- Quarterly, 3 metrics (70% after C1 and C4)

Component Four* - Infection Control

- Quarterly, 3 metrics (16% total funds)

** Available to NFs with NSGO partnerships*

COMPONENT 1

Monthly QAPI Meetings

- Monthly payment to non-state government-owned nursing facilities triggered by the NF's submission of a monthly Quality Assurance Performance Improvement (QAPI) Validation Report to HHSC
- Documentation should include -
 - Meeting minutes
 - Attendance, sign-in sheets
 - Documents related to policies and procedures
 - Records related to analysis and action
 - Demonstrable owner/operator involvement
- Private NFs are not eligible for payments from Component One
- Total value equal to 110 percent of the non-federal share of QIPP

COMPONENT 2

Workforce Development

Monthly - Self-Report in LTSS Portal

- Monthly payments triggered by demonstrating Workforce Development through the following quality metrics:
 - NF maintains four additional hours of RN staffing coverage beyond the CMS mandate (33.3% of weight)
 - NF maintains eight additional hours of RN staffing coverage beyond the CMS mandate (33.3% of weight)
 - NF has a staffing recruitment and retention program that includes a self-directed plan and monitoring outcomes (33.3% of weight)

COMPONENT 3

CMS Minimum Data Set Quality Measurers

Quarterly - No Special Submission Requirements

- Quarterly payments triggered by improvements on the following Minimum Data Set quality metrics:
 - Percent of High-risk residents with pressure ulcers (including unstageable ulcers)
 - Percent of residents who received an antipsychotic medication
 - Percent of residents whose ability to move independently has worsened.

COMPONENT 3

CMS Minimum Data Set Quality Measurers

- Total value equal to 70 percent of remaining QIPP funds after accounting for the funding of Component One and Component Four
- All three metrics relate to Minimum Data Set (MDS) quality metrics and are measured against fixed as well as facility-specific targets.
- NF initial baselines and quality metric benchmarks were posted to the QIPP website in August 2019
- For a quality metric to be considered “met” in a quarter, a NF must perform equal to or better than its facility-specific target or equal to or better than the quality metric’s fixed benchmark

COMPONENT 4

Infection Control Program

Quarterly – MDS & Self-Report

- Quarterly payments triggered by achievement on the following quality metrics:
 - Percent of residents with a urinary tract infection
 - Percent of residents whose pneumococcal vaccine is up to date
 - Facility has an infection control program that includes antibiotic stewardship

COMPONENT 4

Infection Control Program

- Total value equal to 16 percent of the funds of the QIPP
- Private NFs are not eligible for payments from Component Four
- Infection Control Program Elements
 - *(i)* has identified leadership individuals for antibiotic stewardship;
 - *(ii)* has created written policies on antibiotic prescribing;
 - *(iii)* has an antibiotic use report generated by a pharmacy within last 6 months;
 - *(iv)* audits (monitors and documents) adherence to hand hygiene (HH);
 - *(v)* audits (monitors and documents) adherence to personal protective equipment (PPE) use;
 - *(vi)* has an infection control coordinator who has received infection control training;
 - *(vii)* has infection prevention policies that are evidence-based and reviewed at least annually;
 - *(viii)* has a current list of reportable diseases;
 - *(ix)* knows points of contact at local or state health departments for assistance;

COMPONENT 4

Infection Control Program

- Each quarter, the NF must report
 - The presence of a number of infection control elements to exceed a quarterly benchmark
 - For the eligibility period beginning September 1, 2019, the NF must report the presence of seven of the nine elements to meet the metric; and
 - All required data elements regarding infection control tracking

Non-Disbursed Funds

Funds that are non-disbursed due to failure of one or more NFs to meet performance requirements will be distributed across all QIPP NFs based on each NF's proportion of total earned QIPP funds from Components One, Two, Three, and Four combined.

Quality Assurance Review

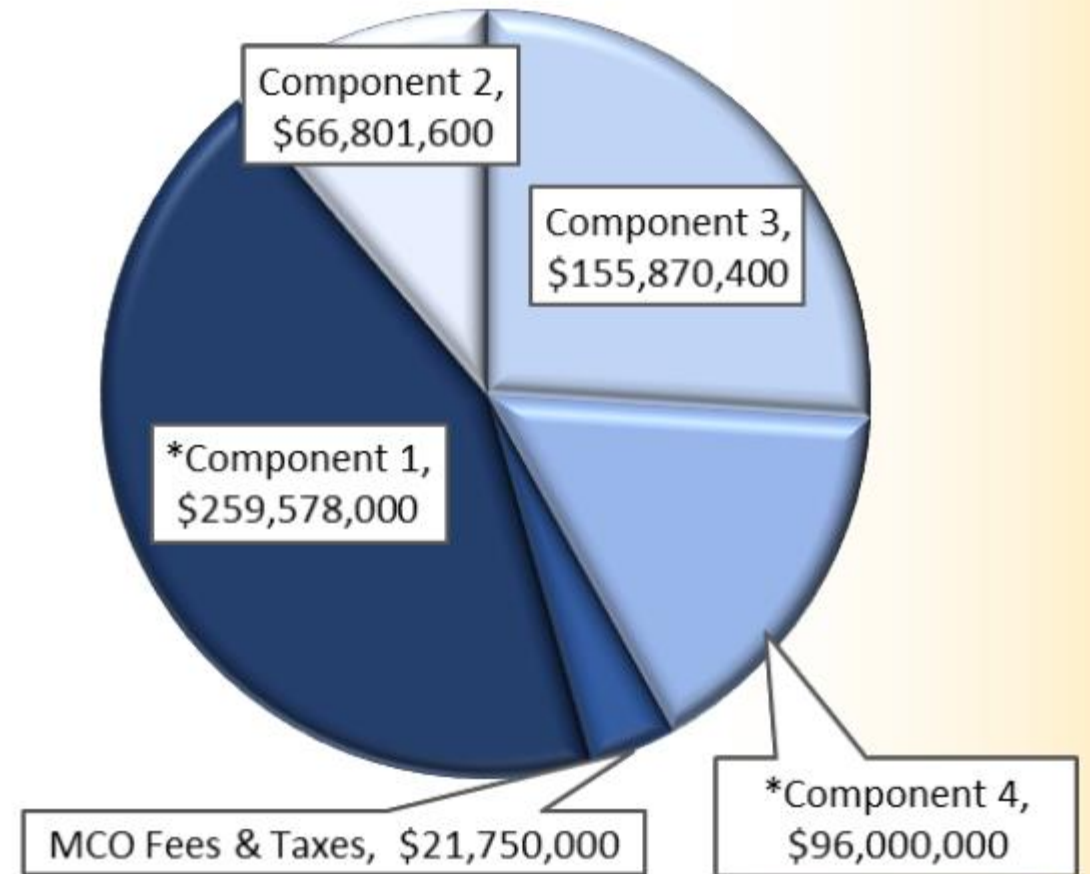
- A representative sample of facilities will be included in Quality Assurance Review for all self-reported data.
 - All three Components (1, 2 and 4) will be reviewed for select NFs
- These reviews will occur **quarterly**, covering three months at a time.
 - The facility has 14 days to submit the requested documents for all three months.

Failure to participate in or complete the quality assurance review may lead to a recoupment of funds and/or referral to the OIG.

QIPP Funds

Individual Component Values:

QIPP Year 3 Estimated Funding	
Total Funds	\$ 600,000,000
NFS Funds (39.33%)	\$ 235,980,000
Federal Funds (60.67%)	\$ 364,020,000
MCO Fees	
MCO Admin Fee = 0.125%	\$ 750,000
MCO Risk Margin = 1.750%	\$ 10,500,000
MCO Premium Tax (State of Texas) - 1.750%	\$ 10,500,000
Total MCO Fees = 3.625%	\$ 21,750,000
Available Funds for Program Components	
Component 1 = NFS plus 10%	
43.26% of Total Funds	\$ 259,578,000
Component 2 = 30% of pool after C1/C4/MCO Fees	
10.16% of Total Fund	\$ 66,801,600
Component 3 = 70% of pool after C1/C4/MCO Fees	
23.7% of Total Fund	\$ 155,870,400
Component 4 = 16% of total funds	
16% of Total funds	\$ 96,000,000



QIPP Alerts

To receive updates related to QIPP:

- Sign up for GovDelivery to receive alerts related to QIPP at:
<https://public.govdelivery.com/accounts/txhhsc/subscriber/new>
- Select the following options under Long-term Care Providers:
 - Nursing Facility Resources
 - Provider Alerts

Compliance Suggestions (Based on recent OIG audit of QIPP)

- NSGO maintains updated bank statements, general ledgers, balance sheets and income statements reflecting IGTs, receipt of QIPP payments, payment of management fees to manager in accordance with the Management Agreement
- Updated, executed copies of Management Agreement, Lease / Sublease Agreement, Business Associate Agreement, and Operations Transfer Agreement
- FMV opinions related to management fees and rent amounts
- Regular visits to nursing facilities
- Documentation of monthly QAPI meetings
- Documentation of any programs, plans, projects or improvements (completed or desired) attributed to QIPP funds
- Documentation of facility's improvement in quality measures

DSRIP Transition Plan

- The 1115 Waiver Special Terms and Conditions require the state to submit a Transition Plan for DSRIP by October 1, 2019 for review and approval by CMS
- Portions of the overall Federal Financial Participation (FFP) for DSRIP will be at-risk if Texas fails to submit the plan or fails to achieve milestones outlined in the plan for DY9-10 (FY 2020-21)
- HHS held a webinar on August 5th regarding the draft DSRIP Transition Plan

DSRIP Transition Plan

- Key Focus Areas for post-DSRIP programs include –
 - Behavioral health;
 - Primary care;
 - Patient navigation, care coordination, and care transitions, especially for patients with high costs and high utilization;
 - Chronic care management;
 - Health promotion and disease prevention;
 - Maternal health and birth outcomes, including in rural areas of the state;
 - Pediatric care;
 - Rural health care;
 - Telemedicine and telehealth; and
 - Social drivers of health.

DSRIP Transition Plan

- The DSRIP Transition Plan will include proposed milestones in 2020 and 2021
 - Updating the Texas VBP Roadmap
 - Updating Medicaid quality strategy
 - Identifying and submitting proposals for new programs
 - Preliminary analysis of DSRIP quality data, etc.
- Ongoing stakeholder engagement
- Final DSRIP payments will be in January 2023

Public Law Legislative Changes

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Public Information Act



Public Information Act (PIA)

SB 944 (Effective September 1, 2019)

Revises the public information request processes for information stored on privately-owned devices.

- Temporary custodians (defined as current or former officers (i.e. board members) or employees) of the governmental body must:
 - transfer public information to the governmental body to be preserved;
 - or
 - preserve the information on the privately-owned device for a period of time specified by the governmental body.

Public Information Act

SB 944 (cont.)

- No personal or property rights to this information.
- Must make a reasonable effort to obtain information from a temporary custodian when requested from the governmental body.
 - Information must be provided to governmental body within 10 days after request.
 - Failure to provide the information can subject governmental body to penalties as well as potential disciplinary action for the employee or officer.

Public Information Act

SB 944 (cont.)

Things to consider:

- Make sure your PIA policies and procedures are up to date.
- Make sure that your record retention policies address this change and provide the retention procedures for information that is in the hands of temporary custodians.
- Entity decides whether to require the officer or employee to maintain the record/information themselves or require that they provide the information to you.
- The retention period for this type of information will still be governed by the record retention schedules put out by the Texas State Library and Archives Commission.

Public Information Act

SB 944 (cont.)

Clarifies how PIA requests are made:

- Governmental body can designate the person who is to receive public information requests.
- A governmental body may designate one mailing address and one electronic mail address for receiving written requests for public information.
- Must use one of the following methods:
 - (1) United States mail;
 - (2) electronic mail;
 - (3) hand delivery; or
 - (4) any other appropriate method approved by the Governmental body, including:
 - (A) facsimile transmission; an
 - (B) electronic submission through the governmental body 's Internet website.

Public Information Act

SB 944 (cont.)

- A governmental body that posts its designated mailing address and the electronic mail address to receive information requests on the governmental body's Internet website or that prints those addresses on the sign required to be displayed by the governmental body under the Public Information Act is not required to respond to a request that is not properly received.

Public Information Act

SB 944 (cont.)

Things to consider:

- Update your PIA policies to reflect these changes.
- Designate a PIA officer to receive requests and a method for receiving requests.
- Post this on your website or on a sign in your administrative offices in accordance with the PIA.

Public Information Act

HB 81 (Effective September 1, 2019)

- The receipt or expenditure of public or other funds for a parade, concert, or other entertainment event paid for in whole or part with public funds must be disclosed under the PIA.
- May not include a provision in a contract related to an event described above that prohibits or would otherwise prevent the disclosure of information described by this subsection.
- A contract provision that violates this subsection is void.

Public Information Act

SB 943 (Effective January 1, 2020)

- Substantially amends the PIA and will likely have significant impacts on disclosure obligations under the PIA.
- Clarifies the Texas Supreme Court's decisions in *Boeing Company and Greater Houston Partnership* which drastically reduced the public's access to information about state and local contracting.
 - Cases have been used to deny over 2,600 PIA requests.
 - Cases allowed governmental entities and vendors to object to public disclosure of documents when such disclosure would provide an “*advantage to a competitor or bidder.*”

Public Information Act

SB 943 (cont.)

Governmental Body seeking to withhold documents must now prove that public disclosure of the requested documents will harm the governmental body's interests and provide "an advantage to a competitor or bidder in a *particular ongoing competitive situation*" or in a *particular competitive situation*" that is *set to reoccur.*"

Public Information Act

SB 943 (cont.)

The following types of “contracting information” are not protected by the trade secret and commercial and financial exception or the proprietary information exception:

- The overall price;
- The price and description of items or services to be delivered;
- Delivery and service deadlines;
- Remedies for breach of contract;
- The identity of parties to a contract;
- The execution and effective dates; and
- Information connected to a vendor or contractor’s performance on the contract.

Open Meetings Act



Open Meetings Act

HB 2840 (Effective September 1, 2019)

Amends the Texas Open Meetings Act to modify how a governmental entity addresses and manages public comment at its board meetings, and now requires the following:

- Must allow every person who wishes to address the board on an agenda item to do so during or before the board considers the agenda item;
- Must allow public comment on agenda items at all board meetings;
- May still establish reasonable rules for public comments, including limiting total time for public comment and total amount of time that a member of the public may address the board on a given item;
- May not prohibit public criticism of the board, including criticism of any act, omission, policy, procedure, program, or service unless such public criticism is otherwise prohibited by law;
- Must provide additional time for public comment for non-English speakers who need a translator.

Open Meetings Act

HB 2840 (Cont.)

Things to consider:

- Governmental entity boards will need to review and revise their policies and procedures on public comment to ensure they comply with the new law.

Contingency Fee Agreements

Contingency Fee Agreements

HB 2826 (Effective September 1, 2019)

A political subdivision (Hospital District and Hospital Authority) may enter into contingency fee contracts for legal services only if it follows certain procedures:

- holds an open meeting (and provides the required notice) to approve the contract and provides notice to the public stating:
 - reasons for pursuing the matter and the desired outcome of pursuing the matter;
 - the competence, qualifications, and experience demonstrated by the attorney or law firm;
 - the nature of any relationship, including the beginning of the relationship with the contracting law firm;
 - the reasons the legal services cannot be adequately performed by the attorneys and supporting personnel of the political subdivision;
 - the reasons the legal services cannot be reasonably obtained from attorneys in private practice under an hourly fee contract without a contingency; and
 - the reasons that entering into a contingent fee contract for legal services is in the best interest of the residents of the political subdivision.

Contingency Fee Agreements

HB 2826 (cont.)

- Once the contract is approved in the open meeting, the board must also state in writing its findings that:
 - there is a substantial need for the legal services;
 - the legal services cannot be adequately performed by the attorneys and supporting personnel of the political subdivision; and
 - the legal services cannot reasonably be obtained from attorneys in private practice under an hourly fee contract without a contingency, because of the nature of the matter for which the services will be obtained, or because the district does not have sufficient funds to pay the estimated amounts under such a contract.

Contingency Fee Agreements

HB 2826 (cont.)

- Attorney General approval is required for these contracts:
 - After the board approves the contract and issues its findings, it must submit the contract to the AG for approval.
 - The AG must approve the contract within 90 days of receipt before it is effective or enforceable.
 - AG may reject the contract (i) if it does not comply with the provisions of Chapter 2254 of the Government Code, or (ii) if the contract involves claims that are similar to ones that the State of Texas has addressed or is pursuing and the district's pursuit of the matter "will not promote the just and efficient resolution of the matter."
 - If the AG does not render a decision within 90 days, the contract is deemed to be approved.

HIPAA



HIPAA

- Continue to see increased HIPAA enforcement actions by the Office of Civil Rights (OCR).
- In 2018, OCR settled 10 cases and secured one judgment, together totaling \$28.7 million.
- Surpassed the previous record of \$23.5 million from 2016 by 22 percent.

HIPAA

M.D. Anderson

- \$4.3 million in civil money penalties for HIPAA violations
- theft of an unencrypted laptop from the residence of an MD Anderson employee and the loss of two USB thumb drives containing the unencrypted ePHI of over 33,500 individuals

Boston Medical Center, Brigham and Women's Hospital, and Massachusetts General Hospital

- \$990,000.00 settlement
- compromising the privacy of patients' PHI by inviting film crews on premises to film an ABC television network documentary series without first obtaining patient authorizations

Anthem, Inc.

- \$16 million settlement with OCR
- Cyberattacks stole ePHI of 79 million individuals.

HIPAA

Pagosa Springs Medical Center

- \$111,400.00
- Critical Access Hospital
- Former PSMC employee that continued to have remote access to PSMC's web-based scheduling calendar, which contained patients' ePHI, after separation of employment.

Cottage Health

- \$3 million payment to OCR
- Unsecured ePHI exposed over the internet

Cyber Liability Insurance

- Typically provides assistance in providing the required notices (important when dealing with a significant breach that may involve multiple states)
 - Individual, Media and Substitute (if required)
 - Many states have separate notice requirements in addition to federal requirements
- Assist in responding to investigations and lawsuit (assignment of breach counsel)
- Will assist in responding to inquiries from the public (i.e. call center, FAQs, scripts)

Contracting

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Contracting

- Revenue sharing agreements
 - Kickback
 - Public Money



Contracting

- When to do an FMV analysis
 - Physician Compensation
 - Physician Leased Space
 - Medical Director/Coverage Agreements

Contracting

- When to do a formal FMV analysis:
 - High Value
 - High Risk



Contracting

- What is FMV Compensation?
 - MGMA
 - Other Published Reports
 - Formal Report by Firm

Contracting

- Common contract terms

- Term
 - Auto renew?
- Termination
 - Cause
 - No cause
- Duties
- Non Compete
 - Time
 - Geography

- Compensation or Cost

- Leases

- Square footage
- Common areas
- Remedies
- Repairs

Contracting

- Choice of Law
- Venue
- Exhibits



Contracting

- Long Form Agreements

- Medical Gas

- Linens

DISCLAIMER OF WARRANTY AGREEMENT
(NOT APPLICABLE IF VEHICLE SOLD WITH EXTENDED WARRANTIES OR SERVICE CONTRACTS)

THIS AGREEMENT HAS BEEN NEGOTIATED AND ENTERED INTO BETWEEN SELLER AND PURCHASER COVERING THE VEHICLE DESCRIBED HEREIN:

YEAR	MAKE	MODEL	BODY STYLE
SERIAL NO.	LICENSE NO.		WEIGHT

The motor vehicle is sold by the seller and purchased by the purchaser **AS IS** "WITH ALL FAULTS" and without warranties of any kind, either express or implied. Any warranties on the vehicle sold hereby are those made by the manufacturer of the vehicle. There are no warranties which extend beyond the description on the face hereof. The purchaser will bear the entire expense of repairing or correcting any defects that presently exist or that may occur on or in the vehicle.

Purchaser's Initials: _____

The seller does not in any way warrant the fitness of the motor vehicle for any particular use or the merchantability of the motor vehicle purchased under this contract. Under Washington uniform commercial code, a warranty of merchantability means that the vehicle must pass without objection in the trade under the contract description, be of fair average quality within the description, and be fit for the ordinary purposes for which vehicles are used.

Seller neither assumed nor authorized any other person to assume for it any liability in connection with the sale of the herein described vehicle, whether the motor vehicle is purchased for commercial or personal, family or household use. Purchaser has inspected the motor vehicle as fully as he/she desired prior to entering into this contract, and understands and agrees that the seller makes no warranty whatsoever express or implied, respecting the quality, characteristics, performance or condition of the motor vehicle or any of its component parts, including, but not limited to the following:

FRAME AND BODY	BRAKING SYSTEM
ENGINE	STEERING SYSTEM
TRANSMISSION & DRIVE SHAFT	SUSPENSION SYSTEM
ELECTRICAL SYSTEM	COOLING SYSTEM
TIRES	WHEELS
a.) Theft (even in excess of minimum standards)	ACCESSORIES
b.) Damage not apparent from visual inspection	1.) Gauged or warning device
FUEL SYSTEM	2.) Radio and/or cassette player
EXHAUST SYSTEM	3.) Air conditioner
	4.) Heater & defroster
	5.) Windows
	6.) Dash items

Nor does the seller make any warranty whatsoever express or implied concerning the length of time or mileage which the motor vehicle will operate or travel after the date of this contract or purchase.

Purchaser's Initials: _____

Purchaser agrees, recognizes and acknowledges that the purchase price for the motor vehicle described herein reflects the fact that the vehicle is being sold **AS IS** without warranty of any kind. Purchaser further agrees that the seller shall have no liability for consequential damages in the event of injury to any persons or property, or any liability for loss of use, loss of time, loss of profits, income, or any other incidental expenses arising from malfunction or defect or unfitness or deficiency of this vehicle.

Purchaser's Initials: _____

The implied warranty is waived in exchange for the following negotiated amount of valuable item:

AGREED TO THIS _____ DAY OF _____

SELLER _____

BY _____ PURCHASER _____

TITLE _____ PRINT NAME _____

THIS AGREEMENT IS A PART OF THE VEHICLE PURCHASE CONTRACT

Vehicle
Model #12

ORDER FORM FROM WQADA (253) 736-0267

THIS FORM IS PROPERTY OF WQADA AND IS NOT TO BE REPRODUCED OR COPIED

REV. 8/14

Contracting

- Stark Exceptions
 - Must be referring physician with financial relationship
 - Office Lease
 - Personal Services
 - FMV Compensation
 - Incidental Benefits
 - Physician Recruitment
 - Non Monetary Compensation

Contracting

- Stark
 - Incidental Benefits
 - Low cost (less than \$35.00 – 2019)
 - On campus.
 - Non-Monetary Compensation
 - Low value (less than \$416.00 – 2019)
 - Cannot be solicited by physician
 - One medical staff event per year not included.

Contracting

- Anti-Kickback (Safe Harbors)
 - Applies to anyone
 - Leases
 - Equipment Rental
 - Personal Services
 - Employees

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