

Section 400.19 - Withdrawal of equity or assets

400.19 Withdrawal of equity or assets. (a) Definitions. For purposes of this section, the following terms shall have the following meanings:

(1) The term equity means:

(i) any right or claim to assets;

(ii) any interest in property or in a business, subject to claims of creditors;

(iii) the difference between assets and liabilities;

(iv) net worth.

(2) The term asset means any owned physical object or any right having economic value to its owner or any item or source of wealth expressed, for accounting purposes, in terms of its cost, depreciated cost determined in accordance with the applicable provisions of Part 86 of this Title, or fair market value at date of donation.

(3) The term withdrawal shall include, but not be limited to, the following examples:

(i) any transfer of a facility's cash or other assets directly or indirectly to or for the benefit of its operator.

(ii) expenditures of the facility's assets or equity for personal items not recognized as reimbursable under the state's medical assistance program.

(iii) any liability incurred within any period of time required for financial reporting in accordance with Part 86 of this Title by a facility or its operator by reason of a mortgage, lease, borrowing or other transaction relating to such a facility that exceeds, in the aggregate, \$50,000.

(iv) any non-arm's length or related party loans made by the facility or its operator, including loans to any individual, corporation, partnership, or other organization related to the facility within the meaning of "related organization", as that term is defined in section 451.229 of this Title.

(v) payment to the operator or owner of a salary in excess of the maximum amount allowed for reimbursement purposes by the Department of Health.

(b)(1) No medical facility operated for profit, or operator of such facility, may withdraw said facility's equity or assets, without the prior approval of the commissioner, if such a withdrawal would create or increase a negative net worth position for the facility or occur when the facility is in a negative net worth position.

(2) A withdrawal shall be considered to have taken place if it has occurred during any period of time required for financial reporting in accordance with Part 86 of this Title.

(3) Negative net worth shall be calculated without regard to any surplus created by revaluation of assets, or to receivables resulting from non-arm's length or related party loans.

(4) When calculating net worth under this section, only the equity or assets of the facility shall be considered, and not any other property owned by the facility's operator, nor any other business entities related to the facility. Appeals and audits made pursuant to Part 86 of this Title and Title 18 (Social Services) NYCRR, respectively, shall not be considered for purposes of calculating net worth unless finally determined.

(5) In any administrative hearing brought pursuant to section 2808(5) of the Public Health Law, this section and Part 51 of this Title it shall be prima facie evidence of a withdrawal of equity or assets in violation of section 2808(5) of the Public Health Law and this section if, at the close of the period of time required for financial reporting in accordance with Part 86 of this Title, a facility is in a negative equity or net worth position and the operator has withdrawn equity or assets from the facility during the period of time covered by the financial report.

(c)(1) An application for approval shall be submitted on forms provided by the Department of Health at least sixty days prior to the proposed withdrawal and shall specify the necessity, purpose, and impact on patient care of the withdrawal and the details concerning such withdrawal including, but not limited to, the principal amount, interest rate, repayment terms, conditions of default, remedies upon default and obligee of any transaction to be consummated in a proposed withdrawal, unless such items are inapplicable. The application shall contain a current interim balance sheet and a description of the facility's cash position, including as cash such cash equivalents as certificates of deposit and treasury bills. Requests shall be made by certified or registered mail. Nothing herein shall be construed to prohibit the commissioner from considering applications submitted less than sixty days prior to the proposed withdrawal in an emergency situation that directly affects the health, safety or welfare of patients.

(2) The commissioner or his designee shall approve or disapprove a request for withdrawal of equity or assets within sixty days of the date of receipt of such a request. Any request not approved or disapproved within sixty days shall be considered approved.

(3) In reviewing an application for withdrawal, the commissioner shall consider: (i) the necessity for the withdrawal;

(ii) whether such withdrawal would impair the facility's ability to render quality care;

(iii) any expense which such withdrawal would generate; and

(iv) the financial condition of the facility in general.

(d) If an analysis of a facility's financial reports indicates the violation of the provisions of this section, the commissioner may review all documents which may indicate a withdrawal of equity has occurred and the facility shall produce all data necessary for the completion of such review.

(e) In addition to any other remedy or penalty available, and after the operator has been granted the opportunity for an administrative hearing, the commissioner may require replacement of the

withdrawn equity or assets and may impose a penalty for violation of this regulation in an amount not to exceed ten percent of any amount withdrawn without prior approval.

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