Fair Market Value Challenges with Physician Integration

by

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Presenter’s Experience

Chris provides fair market value consulting, opinions and valuation services for compliance with the Stark Law, Anti-kickback Statue, False Claims Act and Federal Tax purposes. Mr. David has extensive experience in fair market value appraisals of physician payment arrangements, joint-ventures, tangible assets, intangible assets, medical practices, surgery centers and other healthcare entities.

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Objective

Provide insight and guidance on managing compliance risk with respect to Fair Market Value issues under the Anti-Kickback Statute, Stark Law and False Claims Act.

Agenda

- Legal Framework
- Physician Compensation Best Practices
- Case Review – Citizens Medical Center
- Practice Acquisition Trends & Proper Valuation Methodologies
- Case Study & Practice FMV Reconciliation
Legal Landscape

The following laws govern the transactions and employment arrangements among healthcare providers:

- Stark Law
- Anti-Kickback Statute
- False Claims Act

Stark Law

Generally, the Stark Law prohibits a physician or immediate family member who has a financial relationship with an entity, such as a hospital, from making referrals to that entity for "designated health services" covered by Medicare, unless a specific exception applies.
Stark Law – Penalties for Violation

- Denial of payment or refund/reimbursements
- Excluded from the government programs
- Up to $15,000 per service in civil penalties
- Civil penalties of up to $100,000 for circumvention schemes
- Exceptions apply:
  - Bona fide employment arrangements
  - Surgery centers
  - Space rental
  - Equipment rental
  - Imaging Centers

Anti-Kickback Statute

Known as the Fraud & Abuse Statue, makes it a crime to pay, offer, solicit, or receive remuneration, directly or indirectly, to induce referrals or services of Medicare or Medicaid business unless a safe harbor applies.
Anti-Kickback Statute - Penalties

- Up to 5 years in prison (felony)
- Criminal fines of up to $25,000
- Civil fines up to $50,000 per violation, plus up to 3x times the prohibited remuneration received
- Exclusion from federal healthcare programs
- Intent based

Anti-Kickback Statute - Safe Harbors (some not all)

- Space rental
- Equipment rental
- EHR items & services
- Bona fide employees
- Personal services agreements
- Ambulatory surgical centers
- Sale of practice
  These need to be transacted at FMV
False Claims Act

Claims for reimbursements to a Federal healthcare program that are in violation of the Anti-Kickback Statute and/or Stark Law will usually be in violation of the False Claims Act.

False Claims Act - Penalties

- Federal penalties of up to 3x the amount of the claim and $5,000 to $11,000 per claim
- State penalties – imprisonment and $5,000 to $11,000 per claim
Nonprofit Organizations

- Lose IRC 501(c)(3) status if payments are not within FMV

- IRC 501(c)(3) grants a tax exemption to nonprofits only if “no part of the net earnings of the organization inure to the benefit of any private shareholder or individual”

The Need for FMV Compliance

Any exchange of value with healthcare providers receiving payment under federally funded programs and/or between nonprofits and others may require a FMV determination. These transactions may include:

- Joint venture arrangements
- Pmts to physicians for clinical & admin svcs
- Business acquisitions or dispositions
- Call coverage arrangements
- Equipment leases
- Management services agreements
- Income guarantees
- Continuing education presentations
- Medical device and pharma consulting
Fair Market Value Defined

Fair market value is defined by the Stark Law as the "value in arm's length transactions, consistent with the general market value."

The federal regulations have interpreted "general market value" to refer to the compensation that would be included in a service agreement as the result of a bona fide bargaining arrangement between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party, at the time of the service agreement.

Bona Fide Employment Relationship Exception (Stark)

Physician may be employed by a hospital as long as the amount paid is:

(i) for identifiable services;
(ii) is consistent with the fair market value for services performed;
(iii) is not determined in a manner that takes into account the volume or value of referrals by the referring physician to the hospital; and
(iv) Commercially reasonable
Physician Arrangements Under Scrutiny

- OIG Fraud Alert (June 9, 2015) “Physician Compensation Arrangements May Result in Significant Liability”

- Increase competition for physician employment can foster aggressive compensations

FMV of Physician Compensation

Compensation surveys are the most widely recognized and utilized source of FMV compensation.

- MGMA – Medical Group Management Associates
- AMGA – American Medical Group Association
- SCA -- Sullivan Cotter and Associates
- HHCS – Hospital & Healthcare Compensation Service
- AAMC - Association of American Medical Colleges

Robust surveys with a large number of participants/respondents. Surveys for Medical Directorship, Clinical Compensation and On-Call services
Responsible Use of Survey Data & Best Practices

- Don’t blindly select the 90th percentile (or even the median).
- Utilize more than one salary survey & multiple data points.
- Compute a weighted average based on sample size.
- Consider the physician’s experience and/or productivity (wRVU).
- Develop a method/system to measure quality (or tracking).
- Encourage physicians to track and document their time.
- Understand the compensation being reported (total comp vs. base).
- Analyze compensation as a % of reimbursements.
- Compare pre-employment compensation to proposed compensation.
- Academic vs clinical job (use correct survey).
- Clearly document detail job description and duties.
- Obtain a 3rd party independent FMV from a qualified appraiser.

Use Multiple Sources and Data Points

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<th>Specialty</th>
<th>Source</th>
<th># of Respondents</th>
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<th>Assistant Professor</th>
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Footnotes:
1. Data above represents the 50th percentile value of total compensation.
Responsible Use of Survey Data – Compensation Defined

MGMA
- Mostly private practice physicians
- Includes base salary, bonus W2 earnings, contracted medical compensation (Form 1099; call coverage, med director, other admin svcs) and partnership distributions

HHCS
- Hospital-employed physicians and group practices
- Base salary, bonus and/or incentive payments

Sullivan Cotter
- Total annual base compensation and bonus but excludes on-call pay and other 1099 contract work

Merritt Hawkins Survey
- Base salary or guaranteed income excluding production bonus and benefits
- 64% were based on hospital assignments or hospital employed compensation

Parikh vs. Citizens Medical Center
- Whistleblower case (qui tam)
- Citizens Medical Center (CMC) in Victoria Texas
- $21,750,000 settlement
- Multiple violations of the False Claims Act
- Predicated on the Stark Law and Ant-Kickback Statue
- Kickback scheme - paid bonuses to physicians for referrals
- ER physicians, cardiologists, gastroenterologists, urologists, lithotripsy group and a heart surgeon
- CMC provided unnecessary or worthless medical services – Relators proves this in “painstaking detail” (per judge’s ruling on motion to dismiss)
Parikh vs. Citizens Medical Center

**ER Physicians**
- 12 ER physicians received illegal bonuses for referring patients to CMC Chest Pain Center
- Chest Pain Center showed a 12% increase in patients in 2009
- ½ of revenues from Chest Paint Center paid to ER docs
- ER group received $647,000 in illegal bonuses between Sept 2008 and March 2010
- Allegations of 2 shell companies used to funnel payments to ER docs
- Defendant's motion to dismiss was denied

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**Cardiologist**
- 5 cardiologists involved
- CMC provided incentives (bonuses) to the cardiologists for referrals to CMC’s cardiac surgeon (Dr. Yahagi) and to CMC Chest Pain Ctr.
- Employed at hospital in 2007 and salary more than doubled (market conditions did not change)
- 3 physicians’ combined salary went from $630,000 in 2006 to $1.4m in 2007
- CMC claims they had an expert report to support the salaries were “below the national median”
- The cardiology office practice consistently lost money - $400k in 2008 and $1m in 2009
- Defendant’s motion to dismiss was denied
Parikh vs. Citizens Medical Center

**Big Red Flag –** The Court specifically noted:

- Cardiologists’ salaries more than doubled in 1 year
- The professional practice was losing money (at the same time)
- Makes little economic sense

**Important Take-Aways**

- Relator’s claim that the compensation was **above** FMV was not subject to trial
- Court did not rule that the compensation **was not** FMV
- There was strong inference that compensation was based on volume and value of referrals
- Violates Stark’s “Bona Fide Employee” exception
- Just because physicians’ salary was at that national median doesn’t mean it was NOT FMV
**Parikh vs. Citizens Medical Center**

*Food for Thought*

- Relator’s claim that cardiologist were making “many times more in salary than they earned in private practice” was never tested
- If there was, in fact, no kick-back scheme would the salaries have been FMV?
- Just because a physician earns less as a private practitioner doesn’t necessarily mean that an employer compensation is not FMV.

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**Commercial Reasonableness**

Stark Law

“An arrangement will be considered commercially reasonable in the absence of referrals if the arrangement would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician of similar scope and specialty, even if there were not potential designated health service referrals.”

CMS

An arrangement which appears to be “a sensible, prudent business agreement, from the perspective of the particular parties involved, even in the absence of any potential referrals.”
Commercial Reasonableness

- Does the arrangement make sense?
- Who should be the one to define “reasonable”? 
- Consider operational, clinical and strategic factors for the healthcare organization 
- Management (should) know this better than anyone 
- Document justification for the arrangement (i.e. medical director, on-call)

Commercial Reasonableness

*Questions to Ask*

- What are the duties & responsibilities? 
- Would hospital enter into arrangement if physician did not have ability to refer patients? 
- Is the arrangement reasonably necessary to accomplish operational and/or strategic goals? 
- Can the medical service be obtained from a physician of lesser training and experience, at a lower rate?
Physician Practice Acquisitions On the Rise

Motivating Factors

- Uncertainty of reimbursements
- Higher practice expenses (i.e. malpractice premiums)
- Physicians are tired of managing practices
- Secure steady stream of patients
- Secure a guaranteed salary
- Better work-life balance
- Achieve continuum of care or integrated model

Physician Practice Acquisitions on the Rise

- Asset transaction structure
- Subsequent employment agreement w/ Dr.
- Carve-out ancillary service lines
- Cannot pay more than Fair Market Value of the medical practice
Asset Purchase – Tangible & Intangible
Which assets are being recognized & purchased?

- Furniture, fixtures & equipment (FF&E)
- Trained workforce (non-physician)
- Medical records (elec. & hardcopy)
  - Other identifiable intangible assets?
- Some Hospitals are afraid of intangible assets
  - Medical records = patient list/referrals??

Appropriate Valuation Methodologies & Approaches

**FF&E**
- Cost Approach (primarily) – uses appropriate depreciation factors and age of equip. (not liquidation prices)
- Consider Market Approach for large hi-tech equipment
- Exclude supplies, disposables, samples/drugs, leased office equipment and software
- Exclude leasehold improvements if considered in FMV lease rate
Appropriate Valuation Methodologies & Approaches

FF&E – continued

- Have capital leases assigned or paid-off
- Obtain fixed asset schedule and take accurate inventory of equipment on hand
  
  *Note: Many items could have been expensed and don’t show up on the fixed asset register.*

Discounted Cash Flow (DCF)

- Used to value the whole enterprise
- Can be problematic
- Final value captures all intangible value, even goodwill
- Must adjust physician compensation to post-acquisition compensation
- Ideal for valuation of ancillary service line
**Tangible & Intangible Assets**

**Tangible Assets**
- Furniture, Fixtures & Equipment
- Cash
- Accounts Receivables
- Other Current Assets

**Intangible Assets**
- Trained Workforce in Place
- Patient Files/Charts
- Contracts, Licenses, Certifications
- Goodwill

- **Total Practice Value**

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**Value Reconciliation Example**

- **Total Practice Value - (DCF Method)**: $2,000,000

**Tangible Assets**
- Furniture, Fixtures & Equipment: $200,000
- Cash: $50,000
- Accounts Receivables: $25,000
- Other Current Assets: $10,000

**Intangible Assets**
- Trained Workforce in Place: $200,000
- Patient Files/Charts: $150,000
- **Goodwill (balance)**: $1,365,000

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**Total Practice Value**: $2,000,000
Questions??

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