

What Hospitals and Clinics Should Understand About Compensation and Fair Market Value

Health Law Webinar

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What is Fair Market Value (FMV): Stark

- *Fair market value means—*
- (1) **General.** The value in an arm's-length transaction, consistent with the general market value of the subject transaction.
- (2) **Rental of equipment.** With respect to the rental of equipment, the value in an arm's-length transaction of rental property for **general commercial purposes (not taking into account its intended use)**, consistent with the general market value of the subject transaction.
- (3) **Rental of office space.** With respect to the rental of office space, the value in an arm's-length transaction of rental property for **general commercial purposes (not taking into account its intended use)**, without adjustment to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor where the lessor is a potential source of patient referrals to the lessee, and consistent with the general market value of the subject transaction.

42 CFR §411.351

Compensation Revisited

- You sign a lease in 2006. The market crashes in 2008. How soon must you reassess the market value of the property?
- A physician group enters a PSA with the hospital for 5 years. Must the compensation be re-evaluated every year? Every two years? Every three?

General Market Value

- General market value means—
- (1) Assets. With respect to the purchase of an asset, the price that an asset would bring **on the date of acquisition** of the asset as the result of bona fide bargaining between a well-informed buyer and seller that are not otherwise in a position to generate business for each other.
- (2) Compensation. With respect to compensation for services, the compensation that would be paid **at the time the parties enter into the service arrangement** as the result of bona fide bargaining between well-informed parties that are not otherwise in a position to generate business for each other.
- (3) Rental of equipment or office space. With respect to the rental of equipment or the rental of office space, the price that rental property would bring **at the time the parties enter into the rental arrangement** as the result of bona fide bargaining between a well-informed lessor and lessee that are not otherwise in a position to generate business for each other.

42 CFR §411.351

Beware Of The Trick Question

Commercially Reasonable

- *Commercially reasonable* means that the particular arrangement furthers a legitimate business purpose of the parties to the arrangement and is sensible, considering the characteristics of the parties, including their size, type, scope, and specialty. **An arrangement may be commercially reasonable even if it does not result in profit for one or more of the parties.**

42 CFR §411.351

How Is Compensation Sliced?

- 42 CFR §411.354(c)(2)(ii) states that indirect compensation arrangements examine “**aggregate** compensation from the person or entity in the chain with which the physician (or immediate family member) has a direct financial relationship.”
- Compensation is considered in its entirety (aggregate).
- There is no temporal demarcation.

What is Remuneration?

- Not everything of value is remuneration.
- A civil monetary penalty provisions carves out certain value from remuneration.
- SSA §1128A(i)(6)(F), 42 U.S.C. 1320a–7a(i)(6)(F), excludes from remuneration “any other remuneration which **promotes access to care** and poses a **low risk of harm to patients and Federal health care programs** (as defined in section 1128B(f) and designated by the Secretary under regulations);”

(3) If an arrangement meets all of the requirements to be protected by an exception to the Beneficiary Inducements CMP, would that arrangement also automatically be protected under the Federal anti-kickback statute?

No. The exceptions to the definition of “remuneration” under the Beneficiary Inducements CMP at section 1128A(i)(6) of the Act and 42 CFR § 1003.110 do not provide protection from sanctions under the Federal anti-kickback statute. However, one of the exceptions to the definition of “remuneration” under the Beneficiary Inducements CMP applies to “any permissible practice described in any subparagraph of section 1128B(b)(3) or in regulations issued by the Secretary.” Therefore, any practice that is protected by an exception or safe harbor to the Federal anti-kickback statute also is excepted from the definition of “remuneration” under the Beneficiary Inducements CMP (i.e., such practice does not violate the Beneficiary Inducements CMP), but the reverse is not true.

General Questions Regarding Certain Fraud and Abuse Authorities |
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Does That Analysis Make Sense?

- Congress created the CMP exceptions to “promote access to care.”
- Congress worried that fear of fines would cause people to refrain from promoting access to care.
- If someone says to you “we promise not to fine you, but we might put you in jail,” how safe do you feel?

Remuneration Under Anti-kickback

- Appears that intangibles are NOT remuneration.
- *U.S. ex rel Martin v. Hathaway*, 2023 WL 2661358 (6th Cir., March 28, 2023), “The statute does not define remuneration. At stake is whether it covers just payments and other transfers of value or any act that may be valuable to another. For the reasons that follow, it covers just payments and other transfers of value.”
- How does this impact:
 - Turn around times.
 - Asst. at surgery.
 - NPPs to round.

Medicare Antikickback Statute

- It is illegal to offer, solicit, make or receive any payment intended to influence referrals under a federal health care program.
- The government applies the “one purpose” test. If one purpose of the payment is to influence referrals, the payment is illegal.
- Only applies to payments from OUTSIDE of the corporation.

56 F.R. 35952 (July 29, 1991)

Comment: Many commenters requested the OIG to clarify that payments between corporations which have common ownership are not subject to the statute. Commenters cited as examples intracorporate discounts and payments between two wholly-owned subsidiaries. Some commenters argued that referral arrangements between two related corporations do not constitute "referrals" within the meaning of the statute, and suggested that the OIG define the word "referral" to exclude such activity.

Response: We agree that much of the activity described in these comments is either not covered by the statute or deserves safe harbor protection. **We believe that the statute is not implicated when payments are transferred within a single entity, for example, from one division to another. Thus, no explicit safe harbor protection is needed for such payments.**

Is That Language Still Operative?

- OIG says that it is not, though to my knowledge it hasn't been formally withdrawn.
- There is statutory protection for payment to an employee. The same logic should apply to payment within a corporate family.
- Intent is everything. The question: Is the payment intended to curry favor? Keep asking "why?"
- There is potential risk when your corporation has different entities. Logically, the existence of an additional entity shouldn't matter.
- The government can argue excess comp isn't "bona fide."





Antikickback Advice Caveat

- Epidemic of bad antikickback advice.
- “You must meet a safe harbor...”
- “We didn’t find an advisory opinion, suggesting this is illegal...”
- Self-disclosure makes no sense unless you are admitting improper intent.

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NO PARKING

Stark

- If an entity provides Designated Health Services (DHS), any financial relationship with a physician (or physician's immediate family member) who creates plans of care for those DHS must meet an exception.
- Financial relationships can be ownership or compensation. Stark covers two types of compensation, direct or indirect.

Stark

- Applies only* to Designated Health Services (DHS) for Medicare (and probably Medicaid), but all hospital services are DHS. (See next slide for others).
- Intent doesn't matter; you must meet every part of an exception.
- Not criminal; but the penalty is up to \$15,000/claim.

*Some exceptions apply, see store for details...

“Designated Health Services”

- Clinical laboratory.
- Physical therapy.
- Occupational therapy.
- Radiology services.
- Radiation therapy services and supplies.
- Durable medical equipment and supplies.
- Parenteral and enteral nutrition.
- Prosthetics and orthotics.
- Home health services.
- Outpatient prescription drugs.
- Inpatient and outpatient hospital services.

Stark is Sneaky

- It is much harder to do a Stark analysis.
- The exceptions have weird traps.
- Is “takes into account” different from “varies with?” Is “based on” different from “varies with?”

Stark Quirks

- Remember that compensation to a family member is compensation to the physician. Beware of kids/spouses, parents/grandkids in-laws.
- The “entity” includes both.
 - The entity billing for the service AND the entity providing the service.
 - This prohibits “under arrangements” relationships if the physician who orders the service is providing it “under arrangements.”

Death of Common Sense (and Math)?

- Survey says?
 - Is 50th percentile a ceiling? What about 75th? 90th?
- Conventional wisdom in this area is awful. True analysis seems rare.
- FMV is supposed to ignore presence of referrals. Is that even possible?

Surveying the Environment

- Meghan Wong at MGMA has explained "the data are not intended to be used as an academic data set for extrapolating to the U.S. population of physicians," and are not a "one-to-one representation of the universe of medical practices that are in the country."*
- High and low responses are thrown out.

*Thanks to Tim Smith, TS Healthcare Consulting

Surveying the Environment

- Do people understand “total compensation?”
- Is there an inverse relationship between productivity and per RVU compensation?
- Do groups comply with the “professional data only, no technical fees” request?



Analyze This

- 90th Percentile Interv. Card. CF in 2012:
 - AMGA: \$102.06 MGMA: \$86.47
- 90th Percentile RVU IC.:
 - 2009 16,758
 - 2010 18,316
 - 2011 16,136
 - 2012 15,208 (20% swing from 2010!)

“We Lose Money on Every Physician.”

- If true, is this a problem?
- Is it true?
 - How is overhead calculated and allocated?
 - How is revenue allocated?
- What about ancillaries?

Carrot vs. Stick

- In a privately owned physician group, consider two memos.
- “Every physician who attends the shareholder meeting will receive \$500.
- “Every shareholder who fails to attend the meeting will be fined \$200.”
- Which memo includes a bigger fine/penalty for non-attendance?

Physician Comp Is Atypical (But Should It Be?)

- What professions have identical per-unit fees and pay?
- What do law firms pay for?
 - Clients/revenue.
 - Hours.
 - Revenue.
 - Seniority/experience.
 - Realization.
- Are tiered compensation models good?
- In many integrated systems, the lowest producer gets the highest comp/RVU. That makes NO sense.
- This practice has interesting Fair Market Value (FMV) implications.

Credit for Supervisees OK!

“To the extent that a productivity bonus (or portion of a productivity bonus) paid by a group practice to a physician in the group is solely based on services performed by a member of the physician’s care team that **are not designated health services**, the productivity bonus (or portion of the productivity bonus) would not violate §411.352.”

85 FR 77566

Takes into Account Volume/Value/Other Business

“Compensation to a physician or immediate family member takes into account...if the formula used to calculate the physician’s (or immediate family member’s) compensation includes the physician’s referrals to the entity as a variable, resulting in an increase or decrease in the physician’s (or immediate family member’s) compensation that positively correlates with...”

§ 411.354(d)(4)

Correlation

“For purposes of applying this paragraph, a positive correlation between two variables exists when one variable decreases as the other variable decreases or one variable increases as the other variable increases.”

§411.354(d)(5)

Key Clarification From 2019: 84 Fed. Reg 55766, 55795

“However, for clarity, we reaffirm the position we took in the Phase II regulation. With respect to employed physicians, a productivity bonus will not take into account the volume or value of the physician’s referrals solely because corresponding hospital services (that is, designated health services) are billed each time the employed physician personally performs a service. We are also clarifying that our guidance extends to compensation arrangements that do not rely on the exception for bona fide employment relationships at § 411.357(c), and under which a physician is paid using a unit-based compensation formula

Key Clarification From 2019: 84 Fed. Reg 55766, 55795

for his or her personally performed services, provided that the compensation meets the conditions in the special rule at § 411.354(d)(2) That is, under a personal service arrangement, an entity may compensate a physician for his or her personally performed services using a unit-based compensation formula— even when the entity bills for designated health services that correspond to such personally performed services—and the compensation will not take into account the volume or value of the physician’s referrals if the compensation meets the conditions of the special rule at § 411.354(d)(2) (see 69 FR 16067).”

Set in Advance

- Deemed to be set in advance if set out in writing before the furnishing of items/service/space & formula is set in sufficient detail it can be objectively verified.
- May be modified at any time if:
 - All requirements of an exception are met on the effective date.
 - The modified compensation formula is determined before the furnishing of the item/service and written in sufficient detail to permit objective verification.*

*The preamble notes there is no signature requirement.

85 FR 77594

Set in Advance

“The **surest** and most straightforward way for a party to establish that the compensation under an arrangement is set in **advance is to satisfy the deeming provision** at §411.354(d)(1)(i). Under [it], the parties document the compensation in writing prior to the furnishing of items, services, office space, or equipment in sufficient detail so that it can be verified are deemed to satisfy the set in advance requirement. **However, we are reiterating in this final rule that the compensation (or other formula determining the compensation) does not need to be documented in writing and it does not need to be deemed to be set in advance under [this provision] in order to satisfy the set in advance requirement during the first 90 days of the arrangement.**”

85 FR 77595-96

New Flexibility?

“Given the writing requirement in the new rule at §411.354(d)(1)(ii) on modifying compensation during the course of an arrangement, we are qualifying this statement in the final rule. As finalized in this rule, compensation may be set in advance even if it is not set out in writing before the furnishing of items or services as long as the compensation is not modified at any time during the period the parties seek to show the compensation was set in advance. For example, assume the parties to an arrangement agree on the rate of compensation before the furnishing of items or services, but do not reduce the compensation rate to writing at that point.

New Flexibility?

Assume further that the first payment under the arrangement is documented and that, under §411.354(e)(4), during the 90-day period after the items or services are initially furnished, the parties compile sufficient documentation of the arrangement to satisfy the writing requirement of an applicable exception. Finally, assume that the written documentation compiled during the 90-day period provides for a rate of compensation that is consistent with the documented amount of the first payment, that is the rate of compensation was not modified during the 90-day period. Under these specific circumstances, we would consider the compensation to be set in advance...To the extent that our preamble discussion in the CY 2016 PFS final rule suggested that the rate of compensation must always be set out in writing before the furnishing of items or services in order to meet the second advance requirement of an applicable exception, we are retracting that statement.” - Page 77592

Advanced Imaging Notice

- Give written notice to all MR/CT/PET pts. (Email is ok).
- At time of referral (i.e. NOT registration).
- Must indicate patient can go elsewhere.
- Address/phone for at least 5 “suppliers” within 25 miles. (If fewer than five, list them. If none, no notice necessary.)
- Can say more; may wish to warn about insurance coverage.

Non-Profit/Tax Exemption Issues

- “Private inurement/private benefit” occurs when a person gets an undeserved benefit from a tax exempt organization.
- Intermediate sanctions allow the IRS to recoup the money, plus penalties, from the recipient.

Compensation Formula

- Compensation should be either “profit sharing” or “production bonus.” Productivity bonuses are usually preferable.
 - All DHS revenue for the group/subgroup must be aggregated.
 - Subgroups must have at least five physicians.
 - The same allocation methodology must be used for all DHS.
 - Applies to non-Medicare DHS revenue.
- Stark does NOT require equal division of DHS.

Productivity Bonuses In Group Practice*

- Can credit for services personally performed or “incident to” if not directly related to volume on the value of referrals (may directly relate for incident to). (Diagnostic tests can’t be “incident to.”)
- Deemed not to relate to the volume or value if:
 - Personally performed by the physician,
 - Not DHS and not considered DHS if payable by Medicare, or
 - Revenues from DHS are less than 5% of total revenue and each physician’s compensation.

* You need to be sure you are a group practice!!!!

Options for DHS Under the Compensation Formula

- Productivity (RVUs, visits etc.).
- Choose an allocation and stick with it.
- Equal division.
- Seniority.
- Any combo of above, provided it is used consistently for all DHS within the group/subgroup of 5.
- Anything else unrelated to creating the plan of care.
- Don't forget state law!

Compensation or Dividend?

- Some cases have argued that the if a non-shareholder (physician/NP/PA) leaves money on the table, it must be treated as a dividend, not compensation.
- Even bigger focus on ancillaries.
- Words matter. Beware of “profit.”

Fee Splitting

- May prohibit a physician from sharing revenues with non-physicians, and/or physicians outside of the group except on the basis of work performed.
- May be in ethical rules.
- Unusual interpretations can prohibit percentage management contracts. (See Florida).
- Notice to patients?

Questions

- Can you credit a physician for supervising chemo?
- Can you credit a physician for supervising PT?
- Can an ortho group run ASC profits through its comp formula?
- Can a hospital system pay a group of physicians at FMV and let them divvy it up?
- Can you bonus a physician for a group's profitability?

Presenter



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