

## **Medical Directorships: Key Considerations, Fraud and Abuse Compliance, Lessons From Recent Enforcement**

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# Medical Directorships: Key Considerations, Fraud and Abuse Compliance, Lessons From Recent Enforcement



# Webinar Panelists



- **ANDREA FERRARI, JD, MPH , PARTNER**
- **HEALTHCARE APPRAISERS, INC., [AFERRARI@HCFMV.COM](mailto:AFERRARI@HCFMV.COM)**
- AUTHOR OF “VALUING PHYSICIAN MEDICAL DIRECTORSHIPS FOR HOSPITALS AND OTHER HEALTHCARE FACILITIES” IN THE AHLA/BVR GUIDE TO VALUING PHYSICIAN COMPENSATION AND HEALTHCARE SERVICE ARRANGEMENTS, FIRST AND SECOND EDITIONS
- **WORKS WITH CLIENTS IN ALL 50 STATES AND FOCUS AREAS, IN ADDITION TO MEDICAL DIRECTORSHIPS, INCLUDE:**
- ASSISTING CLIENTS IN THE TRANSITION TO VALUE-BASED PAYMENTS, INCLUDING STRUCTURING, EVALUATING AND IDENTIFYING ISSUES IN ADMINISTRATIVE AND INCENTIVE PAYMENTS MADE IN THE CONTEXT OF COORDINATED CARE AND ALIGNMENT STRATEGIES, SUCH AS FORMATION OF CLINICALLY INTEGRATED NETWORKS, ACCOUNTABLE CARE ORGANIZATIONS, GAINSHARING ARRANGEMENTS AND “HOSPITAL QUALITY AND EFFICIENCY PROGRAMS”;
- FAIR MARKET VALUE IN CLINICAL RESEARCH AND CLINICAL TRIAL AGREEMENTS, INCLUDING ASSISTING CLIENTS WITH BUDGETING FOR CLINICAL RESEARCH AND PLANNING PROVIDER COMPENSATION IN THE CONTEXT OF CLINICAL RESEARCH AND CLINICAL TRIAL AGREEMENTS;
- VALUATION OF PROVIDER RECRUITMENT AND RETENTION STRATEGIES, INCLUDING INCOME GUARANTEES AND RECRUITMENT BONUSES FOR PROVIDERS IN SHORTAGE AREAS;
- COMPENSATION VALUATIONS FOR PUBLIC, TAX-SUPPORTED AND SAFETY-NET PROVIDER ORGANIZATIONS, INCLUDING PUBLIC HOSPITALS AND HEALTH SYSTEMS;
- COMPENSATION FOR ACADEMIC AND UNIQUELY EXPERIENCED THOUGHT LEADER AND “ROCKSTAR” PHYSICIANS; AND
- FAIR MARKET VALUE ANALYSIS FOR DUE DILIGENCE AND LITIGATION SUPPORT.

## ■ ■ Webinar Panelists



**Wesley R. Sylla**  
Attorney

**Hall Render Killian Heath & Lyman**

Mr. Sylla practices in the area of health care law with a focus on hospital-physician arrangements and transactions, fraud and abuse issues and corporate transactions.

■ ■ **HALL**  
■ **RENDER**  
KILLIAN HEATH & LYMAN



**Joseph N. Wolfe**  
Attorney

**Hall Render Killian Heath & Lyman**

Mr. Wolfe provides advice and counsel to many of the nation's largest health systems, hospitals and medical groups on a variety of health care issues. He regularly counsels clients on a national basis regarding compliance-focused physician compensation strategies. Mr. Wolfe is a frequent speaker on issues related to the physician self-referral statute (Stark Law), hospital-physician transactions, physician compensation and health care fair market value issues. Before attending law school at the University of Wisconsin, he served as a combat engineer in the United States Army.



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## ■ Today's Webinar

### Webinar Agenda

- I. Regulatory Overview, Recent Enforcement, Stark & Anti-Kickback Guidance
- II. Compliance Considerations and Best Practices
- III. Determining and Documenting Fair Market Value
- IV. Hypotheticals
- V. Questions



# **Part I: Regulatory Overview, Recent Enforcement, Stark & Anti-Kickback Guidance**

## ■ Regulatory Overview

### Managing Compliance Risk

- ❑ \$2.6 billion in health care enforcement last year (\$4 to \$1 ROI)
- ❑ Continued focus on physician arrangements under Stark and Anti-Kickback
  - ✓ Cases still typically brought by whistleblowers; more government enforcement anticipated
  - ✓ Obligation to self-disclose violations, including technical and FMV issues
  - ✓ Director and executive liability under the “Yates Memo”
- ❑ Process, documentation and proactive compliance are critical to managing risk
  - ✓ Process – Should actively monitor arrangements, especially arrangements involving “rock stars” a/k/a “outliers”
  - ✓ Documentation - Should document fair market value and commercial reasonableness support
  - ✓ Proactive compliance – Focus on the “Big 3” (FMV, commercial reasonableness and volume/value), best practices and finding/resolving implementation issues
- ❑ Physician arrangements must meet a Stark exception. Ensure compliance with Anti-Kickback and Tax Exemption laws too.

# Recent Enforcement

## Recent Cases and Settlements

- **Infirmiry Health System**
  - \$24.5 million settlement, involving physician compensation and Stark group practice issues
- **Tuomey Healthcare System**
  - \$237 million verdict, settled at \$72.4 million, involving compensation with part-time physicians
- **Halifax Hospital Medical Center**
  - \$85 million settlement, involving compensation with employed physicians
- **North Broward Hospital District**
  - \$69.5 million settlement, involving compensation with employed physicians
- **Adventist Health System**
  - \$118.5 million settlement, \$115 million federal, remainder for state level liability
- **Columbus Regional Health**
  - \$35 million settlement, including settlement by the physician medical director for \$425 thousand
- **Citizens Medical Center**
  - \$21.8 million settlement, involving compensation under new employment arrangements
- **Mercy Hospital Springfield**
  - \$34 million settlement, involving physician compensation with employed oncologists
- **Meadows Regional Medical Center**
  - \$13 million settlement, involving physician compensation arrangements
- **Pacific Alliance Medical Center**
  - \$42 million settlement, involving rental and marketing arrangements with physicians
- **Madison Parish Hospital Service District**
  - \$1.8 million settlement, involving equipment and service arrangements allegedly provided below FMV
- **Crittenton Hospital Medical Center**
  - \$3.3 million settlement, involving alleged compensation in excess of FMV and arrangements not implemented consistent with written contracts
- **Metropolitan Hospital**
  - \$2.3 million settlement, involving professional service agreements allegedly in excess of FMV

## Recent Enforcement

### Medical Director Enforcement

Director of JBACC's clinical research program. Dr. Bassett serves as the Medical Director for Clinical Laboratory Services at JBACC. In addition to the medical direction services provided by Dr. Pippas and Dr. Bassett, the Defendants also employ a "Medical Director" for the Radiation Oncology Department of the JBACC, Douglas F. Ciuba, who is one of three physicians who own or are employed by Radiation Oncology of Columbus ("ROC"). Dr. Pawloski, a haematologist, also serves as a Medical Director at JBACC. Of the seven or eight oncologists employed by or under contract with JBACC, half of them serve as "medical directors" and are separately paid stipends for those services.

## Recent Enforcement

# Medical Director Enforcement

54. In fact, as noted, JBACC seemed extraordinarily “top heavy” in terms of the number of medical directors. Of the ten oncologists who saw patients in the

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Case 4:14-cv-00304-CDL Document 3 Filed 12/29/14 Page 28 of 37

JBACC, four of them were medical directors or almost half of the doctors were medical directors, raising questions about whether the positions were really commercially reasonable and necessary to the running of the cancer center and whether they had duplicative and overlapping job duties. Commercial reasonableness is a requirement of remuneration relationships under the Stark Law and the AKS.

# ■ ■ The Regulatory Guidance

## The Fraud and Abuse Laws

### The Anti-Kickback Statute (AKS)

- *Governs all provider contracts*
- Total compensation must be consistent with FMV
- Contract and model should meet an AKS safe harbor

### The Stark Law

- *Governs all physician contracts*
- Total compensation must be consistent with FMV. Terms must be Commercially Reasonable. Can't take into account referrals
- Contract and model must meet a Stark exception

### The False Claims Act

- *Governs all claims reimbursed by the Government*
- Contracts must comply with AKS and Stark for an entity to receive reimbursement
- Actions can be brought by whistleblowers

# ■ The Regulatory Guidance

## The Exceptions and Safe Harbors

### Stark Exceptions

- Rental of Office Space
- Rental of Equipment
- **Bona Fide Employment Relationships**
- **Personal Service Arrangements**
- Physician Recruitment
- Isolated Transactions
- Non-Monetary Compensation
- Fair Market Value Compensation
- Medical Staff Incidental Benefits
- Indirect Compensation Arrangements
- Assistance to Compensate a Non-Physician Practitioner
- Timeshare Arrangements
- In-Office Ancillary Services (available for Stark Group Practices)

### AKS Safe Harbors

- Investment Interests
- Space Rental
- Equipment Rental
- **Personal Services and Management Contracts**
- Sale of Practice
- Referral Services
- Warranties
- Discounts
- **Employees**
- Group Purchasing Organizations
- Practitioner Recruitment
- Ambulatory Surgery Centers
- Ambulance Replenishing

## Recent Stark Guidance

### Proposed Reforms

#### Fair Market Value

- ❑ **Current Compliance Guidance** - Should have “appropriate processes for making and documenting reasonable, consistent, and objective determinations of FMV.”
- ❑ **Proposed Stark Relief** – New rule revises definition of FMV and “general market value.”

#### Commercial Reasonableness

- ❑ **Proposed Stark Relief** – New rule says “Commercially Reasonable” means that the particular arrangement furthers a legitimate business purpose of the parties and is on similar terms and conditions as like arrangements. An arrangement may be commercially reasonable even if it does not result in profit for one or more of the parties.

#### No “Taking Into Account” of Referrals

- ❑ **Stark Relief - Compensation “Takes Into Account Referrals” only if:**
  - ✓ The formula used to calculate the physician’s compensation includes the physician’s referrals to the entity as a variable; or
  - ✓ There is a predetermined, direct correlation between the physician’s prior referrals to the entity and the prospective rate of compensation.

## ■ The Regulatory Guidance

# Commercial Reasonableness

### CMS Commentary in the Proposed Rule (Pg 55790):

However, arrangements that, on their face, appear to further a legitimate business purpose of the parties **may not be commercially reasonable if they merely duplicate other facially legitimate arrangements.**

For example, a hospital may enter into an arrangement for the personal services of a physician to oversee its oncology department. If the hospital needs only one medical director for the oncology department, but later enters into a second arrangement with another physician for oversight of the department, the second arrangement merely duplicates the already-obtained medical directorship services and may not be commercially reasonable.

Although the evaluation of compliance with the physician self-referral law always requires a review of the facts and circumstances of the financial relationship between the parties, **the commercial reasonableness of multiple arrangements for the same services is questionable.**

## ■ The Regulatory Guidance

### Correcting Implementation Errors

- **Guidance:** Parties may correct administrative/ operational payment errors while an arrangement is ongoing.
- **CMS Commentary in the Proposed Rule (Pg 55810):**

Assume further that the entity provides compensation to the physician in months 1 through 6 in an amount other than what is stipulated in the written agreement, and the parties discover the payment discrepancy in early July.

For purposes of this illustration, assume that a hospital pays a physician \$150 per hour for medical director services when the written agreement between the parties identifies \$140 per hour as the physician's rate of pay.

If the \$150 per hour payment is due to an administrative or other operational error—that is, the discrepancy was unintended—the parties may, while the arrangement is ongoing during the term initially anticipated (in this example, during the year of the arrangement), correct the error by collecting the overage (or making up the underpayment, if that is the case).

## ■ The Regulatory Guidance

### The New Limited Remuneration Exception

- Would cover compensation paid for items or services provided by a physician that does not exceed an aggregate of \$3,500 per calendar year (adjusted annually based on CPI-U).
- Cannot exceed FMV and cannot be determined in a manner that “takes into account” the volume or value of referrals or other business generated by the physician.
- **CMS Commentary in the Proposed Rule (Pg 55828):**

For example, one submission to the SRDP disclosed an arrangement with a physician for short-term medical director services while the hospital was finalizing the engagement of its new medical director following the unexpected resignation of its previous medical director.

Despite the hospital’s legitimate need for the services and compensation that was fair market value and not determined in any manner that took into account the volume or value of the referrals or other business generated by the physician, the arrangement could not satisfy all requirements of any applicable exception because the compensation was not set in advance of the provision of the services and was not reduced to writing and signed by the parties.



## **Part II: Compliance Considerations & Best Practices**

# ■ Compliance Considerations

## Is there a demonstrated need?

- Legal requirement and/or analysis or documentation showing need**
  - Medicaid/Medicare Regulations
  - Size of the Service Line
  - Newly Developed Program
- History of physician's serving in the role**
- Number of physician's serving in medical director roles for the service line**
- Benefits of the medical directorship**
  - Defined goals/benchmarks
  - Performance evaluations
- Consistency in establishing medical directorship**

# ■ Compliance Considerations

## Does compensation reflect work effort?

- ❑ **Is the Medical Director a Rockstar?**
  - Rare specialized training and/or certifications
  - Peer-reviewed publications, leadership positions, speaking engagements
- ❑ **Is the Medical Director exceptionally productive?**
  - Are hours performed above and beyond the physician's clinical work?
  - Are there significant (and documented) administrative responsibilities?
  - Are the administrative hours documented appropriately?
- ❑ **Is the Medical Director's work effort consistent with the facts and circumstances in any applicable individualized FMV analysis?**
- ❑ **How was compensation established?**
  - Pre-defined methodology equally applicable to all medical directors across service lines
  - Unique compensation arrangements

# ■ Compliance Considerations

## The Auditing Process

- ❑ Request existing documentation for each contract, including all supporting information (i.e, contracts, amendments, invoices, related policies, documentation evidencing that the contracting process was followed, relevant email correspondence)
- ❑ Evaluate technical compliance with the Stark exceptions and Anti-Kickback safe harbors
- ❑ Evaluate documentation supporting FMV and Commercial Reasonableness
- ❑ Important Considerations:
  - ❑ Regulatory Requirements vs. Best Practices
  - ❑ Importance of FMV Work Product
  - ❑ Compliance Department and Committee Involvement

# ■ Compliance Considerations

## Common Issues

### ☐ Timesheets

- Inadequate description of services
- Documenting clinical work effort as administrative services
- Accuracy of time entries
- Time entry catch-all categories

### ☐ Services

- Performed during clinical hours
- Multiple administrative roles

### ☐ Compensation

- Consistency with underlying documentation
- CR/FMV

## ■ Compliance Considerations

### Self-Disclosure Process, Challenges

#### CMS Self-Referral Disclosure Protocol

- ✓ Actual or potential Stark violations only

#### OIG Self-Disclosure Protocol

- ✓ Stark only conduct is not eligible
- ✓ Remuneration based multiplier (1.5)
- ✓ Much faster than CMS self-disclosure protocol

#### Must analyze for the 6 year lookback period

- ✓ Not all appraisers have this capability

#### Typically must reform/repair arrangement before disclosure:

- ✓ Reforming is often more challenging than self-disclosure
- ✓ Any retrospective FMV analysis must be in sync with the new terms

## ■ Best Practices

### Administrative Arrangements Policy

- **Establishes standards and procedures**
- **Documentation and Process Requirements**
  - Parameters for identifying administrative roles, establishing duties, anticipated time commitments, etc.
  - Maximum hours and maximum compensation rates
- **Important Attachments**
  - Medical Director Addendum (for employees)
  - Services Agreement (for independent physicians and groups)
  - Sample Timesheet

# ■ ■ Best Practices

## Medical Director Provisions

- Recitals – Supportive of appropriate intent and structure
- Establishment of the Services Arrangement
- Appointment(s), Substitutes, Removal
- Responsibilities of the Medical Director: Scope, hours, additional duties and responsibilities, following of rules and regulations, professional standards, etc.
- Scheduling and Monthly Hours
- Hourly Documentation
- Insurance
- Compensation
- Acknowledgements
- Exhibits Defining Objectives/ Duties

# ■ ■ Best Practices

## Common Compensation Components

- Fixed Stipend
- Hourly Compensation
- Metric Driven
  - Determined by improvement in department score, absolute metric score and/ or comparison with peers.
  - Should simulate metrics to understand impact.
  - Consider the impact of adjustments to metrics.
- Consider Interaction with Compensation Process/ Policies
- Formula-Based Compensation and Future Adjustments



# **Part III: Determining and Documenting Fair Market Value**

# Fair Market Value and Commercially Reasonable

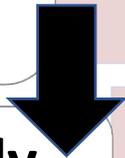
## Distinct But Often Related Evaluations

1. Legal and Regulatory Considerations, Including Qui Tam “Trends”
2. Type of Services We Are Taking About – Identifying and Analyzing the Nature & Scope of Services
3. Selecting and Appropriately Applying Valuation Methods
4. FMV and Commercial Reasonableness Pitfalls and Additional Factors to Consider

# Fair Market Value and Commercially Reasonable

## Legal and Regulatory Considerations

### Fair Market Value



- **42 CFR § 411.351 – Stark Law definition of FMV ( first published 1989):**
- **Phase III commentary (2007)** - “ Referencing multiple, objective, independently published salary surveys” is a prudent practice for evaluating FMV.
- **Compliance Guidance** - Should have “appropriate processes for making and documenting reasonable, consistent, and objective determinations of FMV.” Should follow a “reasonable methodology that is uniformly applied and properly documented.”

### Commercially Reasonable



- **Government Commentary:** “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 no potential DHS referrals.”

### Recognized Distinction Between Physician Clinical and Administrative Services

- “A fair market hourly rate may be used to compensate physicians for both administrative and clinical work, provided that the rate paid for clinical work is fair market value for clinical work and the rate paid for administrative work performed. We note that the fair market value of administrative services may differ from the fair market value of clinical services.”
- Opportunity cost is not an appropriate measure of fair market value for administrative services

# OIG Fraud Alert 2015

***“Physicians who enter into compensation arrangements such as medical directorships must ensure that those arrangements reflect fair market value for bona fide services the physicians actually provide. Although many compensation arrangements are legitimate, a compensation arrangement may violate the anti-kickback statute if even one purpose of the arrangement is to compensate a physician for his or her past or future referrals of Federal health care program business. OIG encourages physicians to carefully consider the terms and conditions of medical directorships and other compensation arrangements before entering into them.”***

***“OIG recently reached settlements with 12 individual physicians who entered into questionable medical directorship and office staff arrangements. OIG alleged that the compensation paid to these physicians under the medical directorship arrangements constituted improper remuneration under the anti-kickback statute for a number of reasons, including that the payments took into account the physicians’ volume or value of referrals and did not reflect fair market value for the services to be performed, and because the physicians did not actually provide the services called for under the agreements...”***

## Legal and Regulatory Considerations –

### What is “Fair Market Value” in 2020?

**Stark Law:** *...fair market value” means the value in arm’s length transactions, consistent with the general market value...(42 USC § 1395NN(H)(3))*

- **42 CFR §411.351** – *“General market value” means the price that an asset would bring as the result of bona fide bargaining between well-informed buyers and sellers who are not otherwise in a position to generate business for the other party, or the compensation that would be included in a service agreement as a result of bona fide bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party, on the date of acquisition of the asset or at the time of the service agreement...*

## Fair Market Value- What Is It?

**IRS Revenue Ruling 59-60:** *...the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts. Court decisions frequently state in addition that the hypothetical buyer and seller are assumed to be able, as well as willing, to trade and to be well informed about the property and concerning the market for such property.*

# Legal and Regulatory Considerations - What is “Fair Market Value” in 2020?

## *U.S. ex rel. Kosenske v. Carlisle HMA (Stark Law)*

*...as a legal matter, a negotiated agreement between interested parties does not “by definition” reflect fair market value. To the contrary, the Stark Act is predicated on the recognition that, where one party is in a position to generate business for the other, negotiated agreements between such parties are often designed to disguise the payment of non-fair market value compensation.*

## Fair Market Value- What Is It?

**Stark Phase I Preamble (66 Fed. Reg. 944)** - Fair market value may be established by any commercially reasonable method that provides evidence that compensation is comparable to what is ordinarily paid for the item or service in the location at issue, by parties in arm’s-length transactions who are not in a position to refer to one another.

- The amount of documentation that will be sufficient to confirm fair market value (and general market value) will vary depending on the circumstances in any given case.

# Legal and Regulatory Considerations- What is “Fair Market Value” in 2020?

## CMS on Methods for Determining Fair Market Value:

May use “any commercially reasonable method” that fits with the Stark definition of fair market value, **but**:

- *“Reference to multiple, objective, independently published salary surveys remains a prudent practice for evaluation fair market value.”*
- *“...the appropriate method for determining fair market value for the purposes of [Stark] will depend on the nature of the transaction, its location, and other factors...”*
- *although a good faith reliance on an independent valuation (such as an appraisal) may be relevant to a party’s intent, it does not establish the ultimate issue of the accuracy of the value itself (69 FR 16107)”*

## Fair Market Value- What Is It?

(72 Fed. Reg. 51015)

# Legal and Regulatory Considerations- What is “Commercially Reasonable” in 2020?

## No actual definition but...

### **1998 Stark proposed rule:**

*We are interpreting “commercially reasonable” to mean that an arrangement appears to be a sensible, prudent business agreement, from the perspective of the particular parties involved, even in the absence of any potential referrals. (63 Fed. Reg.1700)*

**2004** - *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 (or family member or group practice) of similar scope and specialty, even if there were no potential DHS referrals. (69 Fed. Reg. 16093)*

## Commercially Reasonable – What Does it Mean?

# Legal and Regulatory Considerations in FMV

## *U.S. ex rel. Villafane v. Sollinger* Dismissed, 2008

**Dismissal:** Claims related to AMC Stark exception and AKS

**Relator:** Pediatric cardiologist and Associate Professor of Medicine

**Decision:** Chief of Staff compensation, even though near or above the high of the range of compensation supported by surveys of other physicians of the specialty (neonatology) **did not fail the test of fair market value because:**

- **The physician was at or near the top of his profession;**
- **The physician had substantial responsibilities within the medical school that warranted higher compensation than peers; and**
- **Comparing this top physician with physicians represented in general salary surveys is comparing “apples to oranges.”**

# Legal and Regulatory Considerations in FMV

*U.S. ex rel. Parikh, et al. v. Citizens Medical Center*

**Settled April 2015**

**Settlement:** \$21 million, 5 year CIA

**Relators:** Staff physicians who had been penalized under the arrangements

**Allegations:** (1) Alleged Stark Law and AKS violations were based on V+V of referrals to chest pain center rather than true indications of quality; (2) Stark Law and AKS violations tied to allegations that cardiologist compensation was in excess of FMV (even though it was below the median of surveys) because cardiologists made more after being employed by the hospital than they did before, when independent; (3) Alleged Stark Law violations tied to allegations that gastroenterologists received “duplicative” and non-FMV compensation for “medical director services” that were really medical professional services for which the physicians were already paid in professional fees

# Legal and Regulatory Considerations in FMV

*U.S. ex rel. Felten v. William Beaumont Hospitals, et al., U.S. ex rel. Carbone v. William Beaumont Hospital, U.S. ex rel. Pawlusiak v. Beaumont Health System, et al., U.S. ex rel. Houghton v. William Beaumont Hospital*  
Settled August 2018

**Settlement:** \$84.5 million, 5 year CIA

**Relators:** Multiple; initial whistleblower was hospital's director of research

**Allegations:** False Claims Act case that alleged Antikickback Statute and Stark Law violations related to compensation to physicians that other physicians on staff referred to as the "Royal Family" and "Goldilocks and the Three Bears" ; the nicknames were because these physicians were believed to be given lucrative perks, including prime paid positions such as "gratuitous directorships" and research compensation that was based on false assumptions

# Identifying Nature and Scope of Services

## An Accurate Understanding of the Nature and Scope of Services May Be Key

Many types of arrangements may be in the category of “medical directorships” – the generic descriptor does not tell the whole story, and services do not always fit a well-defined mold

- Titles, duties and contexts vary widely
- Hospitals, AMCs, ACOs, CINs, other healthcare businesses may use different terminology for these types of positions
- Administrative services may be mixed with clinical services
- Special qualifications may be required (or not):

Training and experience in a particular medical specialty or subspecialty may be a qualification for some types of medical directorships/administrative roles

### **Example:**

Training and experience as a cardiovascular surgeon is reasonably necessary to develop clinical quality assessment and improvement programs, anticipate equipment and staffing needs and secure clinical practitioner buy in for operational initiatives in a cardiovascular surgery program. An internal medicine physician who does not regularly perform or participate in cardiovascular surgeries may not reasonably be expected to perform these duties.

# Identifying Nature and Scope of Services

## An Accurate Understanding of the Nature and Scope of Services May Be Key

### ❑ Who will perform the duties the arrangement requires?

- Do the duties require the expertise of a physician?
- Do the duties require the expertise of a physician of a particular specialty or subspecialty?
- Do the duties require the expertise of a physician with highly specialized training, experience or expertise?

### ❑ What are the specific duties to be performed under the arrangement?

- Clinical or administrative services or both?
- Is the physician providing oversight of a particular department or program?
- Is the physician developing or implementing quality assessment or quality improvement initiatives for a particular department or program?
- Is the physician selecting, purchasing, testing and/or developing protocols for the use of new equipment or supplies in a department or program?
- Is the physician assessing the need for, selecting, developing and/or personally delivering education programs for clinical staff in a specialty department?
- Is the physician performing other duties related to the development, leadership, oversight or planning of specific product line(s), services(), department(s), facility(ies) or clinical unit(s)?

# Identifying Nature and Scope of Services

## An Accurate Understanding of the Nature and Scope of Services May Be Key

### ❑ When and where are the duties to be performed?

- Term of the agreement?
- Schedule or time interval of services (fixed or maximum number of hours per month, week, year, etc.)?
- Are the duties performed during regular work hours in the regular work location?
- Does the physician have greater or lesser burden as a result of the schedule (or lack of schedule) for performing the duties?
- What is the geographic area, setting and business type?

### ❑ How will the physician be compensated for performing the duties ?

- Hourly based on hours worked and documented?
- Fixed fee or salary? If so,
  - What is the estimated time requirement to perform the duties?
  - Is completion of discreet tasks or work products a prerequisite to payment? Do those tasks or work products have discernable value?

# Selecting Valuation Approach

An Accurate Understanding of the Nature and Scope of Services May Be Key

- ❑ **Market Approach** – relies on comparison to similar arrangements in the marketplace; without identification and understanding of the particulars of an arrangement, the valuator may incorrectly treat as materially comparable arrangements that are not materially comparable
  
- ❑ **Cost Approach** – relies on identification and/or “build up” of the cost of substitutes or alternatives for an asset or services arrangement; may be an appropriate valuation approach for certain unique “fixed fee” service arrangements or those that require completion of discreet tasks with measurable value unto themselves
  
- ❑ **Income Approach** – measures income to be derived from the services; may be an appropriate valuation approach in certain limited circumstances, perhaps in conjunction or overlapping with one or more other approaches –
  - E.g., valuation may be based in whole or part on measurement of cost savings/net revenue to be gained from medical director’s successful design and implementation cost savings initiatives

# Commercially Reasonable

## An Accurate Understanding of the Nature and Scope of Services May Be Key

- **Will a reasonable party with a legitimate business purpose provide compensation for medical director services that are:**
  - ❑ Already sufficiently performed by another party? (Beware of redundant services, unless there is a need for redundancy.)
  - ❑ Services for which the physician already receives compensation from another source?
  - ❑ Services that do not add significant value to the entity's operations?
  - ❑ Services that are to be performed during physician time that has already been "purchased"?
    - E.g., medical director services that are performed during hours when the physician is being paid by the hospital to be onsite for the purpose of providing clinical hospitalist services, but there is downtime

# FMV and Commercial Reasonableness Pitfalls

## Things to Consider

### ❑ Duplicative Payments

- Payments for medical director/administrative services performed during or overlapping with compensated clinical service time
- Payments for services that duplicate or overlap with other medical director/administrative services
- Some duplication or overlap may be ok if aggregate compensation is within the range of aggregate FMV

### ❑ Medical Director Payment Disparities

- 10 medical directors have the same or similar duties and 9 are paid the same amount while one gets paid at a substantially higher rate

### ❑ Extensive Medical Director Time Requirements or Time Commitments

- Physician is paid for 100 medical director hours per month, spread across 5 positions such that each individual position is below the hospital's "review threshold" of 30 hours per month but in aggregate they are more than 0.5 FTE

### ❑ Clinical/Administrative "Creep" in Position Duties

- Physician is paid for a clinical position that has increasing proportion of administrative duties or vice versa



# Part IV: Hypotheticals

## ■ Hypothetical #1

### Payment Glitch

- ❑ Fact Pattern: Dr. Admin, an employed family practice physician, is the Medical Director for Hospital's neurosurgery department. Under his employment agreement, he is supposed to be paid \$140 per hour for each hour of medical director services that he documents in his monthly time sheets. The compliance department discovered that Hospital has been mistakenly paying Dr. Admin \$145 per hour for the past 6 months. Many of Dr. Admin's timesheets are very difficult to read and some of the timesheets have entries that do not add up to the final hours referenced.
  
- ❑ Questions:
  - ✓ What can/should Hospital do?
  - ✓ What if they mistakenly paid him \$600 per hour instead?
  - ✓ Does the analysis change if he is an independent physician?

## ■ Hypothetical #2

### Short Term Arrangements

- ❑ Fact Pattern: Hospital's medical arrangement with Dr. Quitter ended abruptly with the termination of his independent contractor arrangement. Dr. Helper, another independent physician, stepped in to help with ten (10) hours of short-term medical director services while Hospital finalized the engagement of its new medical director. Dr. Helper's arrangement was not in writing, but Hospital believes the rate paid was consistent with fair market value.
  
- ❑ Questions:
  - ✓ Does the lack of a writing create regulatory issues?
  - ✓ Would it help if Dr. Helper was an employed physician?
  - ✓ Will the proposed Stark changes impact the analysis?

## ■ Hypothetical #3

### Director of Medical Quality

- ❑ Fact Pattern: Dr. Smith specializes in orthopedic surgery, is one of University Hospital's busiest physicians, and has been engaged as an independent contractor to serve as Director of Medical Quality for University Hospital's orthopedic trauma program. There is a different Medical Director of Orthopedics. Dr Smith's duties as Director of Medical Quality include managing the on-call coverage schedule for orthopedic trauma, setting and overseeing implementation of quality goals for the orthopedic trauma program and identifying and overseeing implementation of cost savings measures for orthopedic devices and implants. Dr. Smith is required to devote a minimum of 20 hours per month to the Director of Medical Quality position, which includes attending weekly meetings of University Hospital's Quality Committee, which meets jointly with the quality committee of University Hospital's ACO. Dr. Smith is paid a fixed stipend of \$5,000 per month for the Director of Medical Quality position and is also eligible for an additional 10% bonus if his department achieves specified quality and cost savings goals.
  
- ❑ Questions:
  - ✓ What are the potential FMV and commercial reasonableness pitfalls of this analysis?
  - ✓ Will the proposed Stark changes or existing waivers impact the analysis?

## ■ Hypothetical #3 (Cont'd)

### Director of Medical Quality (Cont'd)

- ❑ Fact Pattern (Cont'd): Dr. Smith, through an older, separate arrangement, serves on the quality committee for University Hospital's ACO, as representative for his department on this committee. He is compensated for an additional 20 hours per month for this position, at a rate of \$150 per hour; the \$150 per hour is the rate of payment for almost all other Medical Director and committee positions at University Hospital other than Director of Medical Quality for orthopedic trauma. The department has service line co-management and gainsharing arrangements with physicians in the department, including Dr. Smith. It also participates in a hospital quality and efficiency program through the ACO (that is the reason for the joint meetings). Dr. Smith is eligible for and receives distributions from the ACO for cost savings and quality achievements.
  
- ❑ Questions:
  - ✓ What are the potential FMV and commercial reasonableness pitfalls of this analysis?
  - ✓ Will the proposed Stark changes or existing waivers impact the analysis?





## Thank You

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