MANAGING HOSPITAL/PHYSICIAN FINANCIAL RELATIONSHIPS

James D. Horwitz, Esq.
HCCA Annual Compliance Institute
April 27, 2009

AGENDA

- Laws and Environment
- Application of laws, agency actions and guidance to policy development and organizational education.
- Auditing hospital/physician financial relationships
Underlying Rationale:

Paying for referrals results in:
- Patients having unnecessary procedures;
- More costs to Medicare/Medicaid
- Providers making referrals based on provider interest rather than patient interest
## Antikickback and Stark Laws

**Antikickback**

Unlike STARK provisions, applies to everyone, not just providers of care

Criminal & civil – both the kickback payer and receiver are liable

It is illegal to:
- Offer or pay remuneration to anyone to induce them to refer a patient.
- Solicit or receive remuneration in return for the referral of a patient

Intent based statute.

<table>
<thead>
<tr>
<th>Antikickback</th>
<th>Stark</th>
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<tbody>
<tr>
<td>Unlike STARK provisions, applies to everyone, not just providers of care</td>
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</table>
Federal Tax Law – Intermediate Sanctions

- Was enacted as Taxpayer Bill of Rights in 1996 to enable the IRS to impose sanctions less onerous than stripping tax exempt status
- Prohibits excess benefit transactions with a “disqualified person”
- An *excess benefit transaction* is any transaction in which an applicable tax-exempt organization provides an economic benefit, either directly or indirectly, to a disqualified person, where the value of that economic benefit exceeds any value that the organization receives in return.

<table>
<thead>
<tr>
<th>Law</th>
<th>Penalties</th>
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<tbody>
<tr>
<td>Stark (SSA §1877)</td>
<td>If knows or should know that prohibited referral, a civil monetary penalty (&quot;CMP&quot;) of up to $15,000 for each such service plus two times the reimbursement claimed. A CMP of up to $100,000 and exclusion can be imposed on persons who enter into circumvention schemes (such as a cross referral arrangement).</td>
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<tr>
<td>Antikickback (SSA §1128B)</td>
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<tr>
<td>Excess Benefit Transaction (Tax Law)</td>
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</table>
“Chapter 442 of 2006 was the most sweeping Medicaid fraud enactment in the history of the [NYS Medicaid] program.” (HANYS – Setting the Record Straight – March 2007)

DON’T FORGET STATE LAW

The Environment

CMS Report: Public and private outlays for health care reached $2.2 trillion, or $7,421 per person in 2007; up 6.1% from 2006. Share of nation’s gross domestic product – 16.2%

OMIG recovered $551 million in FY 2008 through Medicaid audits, investigations and program review, Gov. David A. Paterson and Medicaid Inspector General (MIG) Jim Sheehan announced Dec. 12. That’s more than was recovered by all the states combined in 2007, Sheehan says.
05-10-2008

– Spartanburg Regional Healthcare System, South Carolina, agreed to pay $780,000 for allegedly violating the Civil Monetary Penalties Law provisions applicable to kickbacks. The OIG alleged that Spartanburg provided information technology (IT) resources to non-employee physician groups without written contracts in place. Spartanburg failed to document IT agreements with ten different physician practices/groups and also failed to bill and collect for those IT resources.
08-11-2008

- Ivinson Hospital, Wyoming, agreed to pay $635,000 for allegedly violating the Civil Monetary Penalties Law provisions applicable to kickbacks. The OIG alleged that Ivinson paid prohibited remuneration to physicians in the form of free rent, equipment and furnishings, leases at less-than-fair-market value, reimbursement for medical-director services in excess of fair-market value, and reimbursement in excess of the requirements of an income guarantee agreement.
This was a *qui tam* action brought by former member of physician group under False Claims Act alleging false certifications made in billing submissions that there had been compliance with Stark and Anti-kickback laws.

Arose out of an exclusive contract with anesthesiologists for pain management and anesthesia services.

The court found that the hospital failed to substantiate that the arrangement satisfied the “personal services” exception under the Stark and anti-kickback laws.

The court faulted the hospital for not providing evidence regarding the fair market value of the space, equipment, staff and exclusive rights received by the physicians.

Because Medicaid is partly funded with federal money, OMIG can wield the Stark and federal anti-kickback laws against illegal financial relationships. In addition, in New York and some other states, hospitals can face additional sanctions — such as fines, penalties or even exclusion — for kickbacks and similar offenses through the use of a state law that bars unacceptable practices under Medicaid, Sheehan says. “The hypothesis is that funds needed for patient care have been diverted to payments to physicians for referrals. We hear that anecdotally and now we need to determine” whether it’s true, and if so, how pervasive payments for physicians’ referrals are.
Managing Hospital-Physician Financial Relationships

CORPORATE INTEGRITY AGREEMENT
CONTRACT BETWEEN THE
OFFICE OF INTEGRITY GENERAL
OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES
AND
HILO MEDICAL CENTER

1. TERMS AND SCOPE OF THIS ICA

A. The period of the compliance obligations assumed by Hilo under this CIA shall be three years from the effective date of this CIA, unless otherwise specified. The effective date shall be the date on which the final signature of this CIA executes this CIA (Effective Date). Each one-year period, beginning with the one-year period following the Effective Date, shall be referred to as a "Reporting Period."

B. Sections VII, IX, X, and XI shall expire no later than 120 days after OIG's receipt of: (1) Hilo's final annual report, or (2) any additional materials submitted by Hilo pursuant to OIG's request, whichever is later.

C. The scope of this CIA shall be governed by the following definitions:

1. "Arrangements" shall mean every arrangement or transaction that:
   a. involves, directly or indirectly, the offer, payment, solicitation, or receipt of anything of value, and is between Hilo and any actual or potential source of health care business or referrals to Hilo or any actual or potential recipient of health care business or referrals from Hilo. The term "source" shall mean any physician, contractor, vendor, or agent and the term "health care business or referrals" shall

2. "Compliance Officer" shall mean a full-time employee of Hilo designated in writing by Hilo's Board of Directors to be responsible for implementation, administration, and management of the CIA.

3. "GC" shall mean General Counsel of Hilo.

4. "CFO" shall mean Chief Financial Officer of Hilo.

5. "Board" shall mean the Board of Directors of Hilo.


3 years

• Est. compliance program
• Compliance Officer not subordinate to CFO and GC; reports at least quarterly to Board
• "Arrangements Training" (Stark; anti-kickback) to all officers, directors, employees, members of active medical staff
• Independent Review Organization ("IRO") retained to check
  Arrangements Review and Unallowable Costs Review – OIG may remove IRO
• New business unit or location notification to OIG
• Annual report to OIG
• Stipulated daily penalties regarding failure to comply with elements of CIA
Financial Relationships (Remuneration) Include

- Administrative Services
- Joint Ventures
- Rentals
- Equipment
- Contracts
- Loans
- Travel
- IT Services
- Medical Directorships
- Gainsharing
- Rentals
- Gifts
- On-Call Arrangements
- Marketing Services
- Office Rentals
- Entertainment
- Charitable Contributions

FOLLOW THE AGENCIES TO NAVIGATE THROUGH THE SHOALS
OFFICE OF INSPECTOR GENERAL

SPECIAL ADVISORY BULLETIN

CONTRACTUAL JOINT VENTURES

April 2003 (C)

Department of Health and Human Services
OFFICE OF INSPECTOR GENERAL

FINANCIAL ARRANGEMENTS BETWEEN HOSPITALS AND HOSPITAL-BASED PHYSICIANS

Richard P. Kueserow
INSPECTOR GENERAL
OIG-08-03-0009

11
The Requestor proposes to employ two physicians (the “Physician Employees”) on a part-time basis to perform endoscopies on the Requestor’s own premises. Each of the Physician Employees also has a separate medical practice, at separate premises, at which he or she will continue to see patients outside the part-time employment relationship with the Requestor.

The anti-kickback statute does not prohibit payments made by employers to their bona fide employees, for employment in the furnishing of items or services for which payment may be made under Medicare, Medicaid, or other Federal health care programs. Whether an employee is a bona fide employee for purposes of the employee exception to the anti-kickback statute is a matter that is outside the scope of the advisory opinion process.

The Government is finding new ways to investigate hospital-physician relationships:

- Form 990
- Disclosure of Financial Reporting Relationships
Joint ventures

Explain whether policies on documentation and compensation approvals are consistent with the intermediate sanctions safe harbor

Policy on Compliance with Rebuttable Presumption

“Most, if not all, hospitals have financial relationships with referring physicians. These financial relationships may involve ownership or investment interests, compensation arrangements, or both. The financial relationships can be direct or they may be indirect. . . . Consistent with congressional intent in enacting the physician self-referral statute, we believe it important to query hospitals concerning their financial relationships with physicians.”
On December 19, 2008, the Centers for Medicare and Medicaid Services ("CMS") requested federal authorization to collect detailed information regarding their hospital/physician financial relationships from approximately 400 community hospitals.

“The DFRR collection instrument will be used by CMS to (1) identify arrangements that potentially may not be in compliance with the physician self-referral statute and implementing regulations; and (2) identify examples and areas of noncompliance that may assist us in any future rulemaking concerning the reporting requirements and other physician self-referral provisions.”
Worksheet 7

Compensation Arrangements — Physician Recruitment, Personal Service Arrangements, and Rental of Office Space and Equipment

<table>
<thead>
<tr>
<th>Physician Name</th>
<th>Physician License No.</th>
<th>Ownership/Investment</th>
<th>Physician Recruitment</th>
<th>Personal Service Arrangement</th>
<th>Rental of Office Space</th>
<th>Rental of Equipment</th>
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- Physician Recruitment
- Personal Service Arrangement
- Rental of Office Space
- Rental of Equipment

The requested disclosures on Worksheets 1 through 6 pertain only to hospitals with physician ownership or investment. For purposes of this Report, ownership is synonymous with investment.
1. Isolated transactions?

2. Remuneration unrelated to DHS?

3. Payments from physician to hospital?

4. Charitable contribution by physician?

5. Non-monetary comp exceeding limits?

6. Investment return % higher than contribution?

7. Loans to or loan guarantees on behalf of physicians?

8. Initial investments, etc. made on behalf of physicians?

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CMS Dec. ‘08

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Publications: Hospital-Physician Joint Marketing Compliance Guidelines

*The Health Lawyer, Volume 21, Number 2, December 2008*

By: Lynn Gordon

Hospitals often engage in certain marketing of the physicians who are members of their medical staffs. While such activity may be appropriate, even at no cost to physicians, the scope and type of marketing must be monitored to ensure compliance with fraud and abuse and physician self-referral laws.

As recommended for Stark Law compliance, in the event that a hospital engages in support that goes beyond that addressed in the Stark Incidental Benefits and Nonmonetary Compensation Exceptions, it should establish the fair market value and charge for such services, keeping a record thereof. Also, the hospital should not differentiate among whom it may providing marketing support for based on any volume or value of referrals differential.
Policies

Recruitment

Title: Physician Recruitment

Area: Compliance

Expiring Date: December 31, 2023

Title: Deputy Director, Compliance Program

Purpose: To ensure compliance with laws and regulations related to the recruitment of physicians, including but not limited to the Fair Labor Standards Act, the Americans with Disabilities Act, and other applicable laws. The process is designed to ensure that all recruitment activities are conducted in a manner that complies with all legal requirements.

Definitions:

1. Physician: A licensed medical doctor who is employed by the organization.

2. Full-time Equivalency: The number of full-time positions that an individual can fill in a given time period.


4. Equal Employment Opportunity: The legal requirement that prohibits discrimination in employment on the basis of race, color, religion, sex, national origin, age, disability, or genetic information.

5. Good Faith Effort: The reasonable effort made by the organization to comply with all laws and regulations.

6. Background Check: A process used to verify the accuracy of information provided by a candidate.

7. Reference Check: A process used to verify the accuracy of information provided by a candidate.

8. Job Posting: A notice of the available positions that is distributed to the public.


10. Acceptance: The candidate's decision to accept or decline the offer.

Compliance:

- All recruitment activities must be conducted in compliance with all applicable laws and regulations.
- All candidate information must be handled in a manner that respects the privacy of the candidate.
- All recruitment processes must be fair and impartial.

Contact Information:

Director of Compliance: John Smith
Phone: 123-456-7890
Email: jsmith@organization.com

Updated: December 31, 2023

Reviewed: January 1, 2024
Recruitment

- Stark II, Phase III
  - Advisory Opinions
    - No. CMS-AO-2006-01 (Nov. 6, 2006)
    - No. CMS-AO-2007-01 (Sept 2007)

- Antikickback
  - Fraud Alert (1991)
  - Advisory Opinion (No. 01-04)
  - Safe Harbor

- Tax Exempt Considerations
  - Hospital Audit Guidelines published in 1992
  - Revenue Ruling 97-21, 1997-1 C.B. 121 (April 21, 1997)
There are many portals into the hospital where physicians interact and where a financial relationship can be established.
It is the large group of middle managers who are the key to bridging the chasm between legal requirements and compliance.

THE ROAD TO MIDDLE MANAGEMENT:

- Demonstrated commitment by Board and Senior Management
- Continuous education
- Departmental Monitoring Plans
- Integration into the day-to-day fabric of the organization’s operations
Compliance: Physician Relations 001 Form 1

THIS DOCUMENT MUST BE COMPLETED, SIGNED BY ALL PARTIES AND A COPY SUBMITTED TO ACCOUNTS PAYABLE AS A CONDITION OF PAYMENT.

<table>
<thead>
<tr>
<th>PROVIDER NAME</th>
<th>FOR MONTH</th>
<th>POSITION HELD</th>
<th>CONTRACT PERIOD</th>
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<table>
<thead>
<tr>
<th>DATE SERVICE PERFORMED</th>
<th>DESCRIPTION</th>
<th>TIME SPENT</th>
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</table>

Physician Signature and Date       Manager Signature and Date       Vice President Signature and Date

Received Accounts Payable or Payroll (as applicable) (Signature and Date) ____________

The Audit
ARRANGEMENTS DATABASE

Hilo shall create and maintain an Arrangements Database to track all new and existing Arrangements in order to ensure that each Arrangement does not violate the Anti-Kickback Statute or Stark Law. The Arrangements Database shall contain certain information as appropriate to assist Hilo in evaluating whether each Arrangement violates the Anti-Kickback Statute or Stark Law, including but not limited to the following:

1. Each party involved in the Arrangement;
2. The type of Arrangement (e.g., physician employment contract, medical directorship, lease agreement);
3. The term of the Arrangement, including the effective and expiration dates and any automatic renewal provisions;
4. The amount of compensation to be paid pursuant to the Arrangement and the means by which compensation is paid;
5. The methodology for determining the compensation under the Arrangements, including the methodology used to determine the fair market value of such compensation;
6. Whether the amount of compensation to be paid pursuant to the Arrangement is determined based on the volume or value of referrals between the parties;
7. Whether each party has fulfilled the requirements of Section III.D.2 of the CAA; and
8. Whether the Arrangement satisfies the requirements of an Anti-Kickback Statute safe harbor and/or a Stark Law exception or safe harbor, as applicable.

D. Compliance with the Anti-Kickback Statute and Stark Law.

1. Arrangements Procedures. Within 90 days after the Effective Date, Hilo shall create procedures reasonably designed to ensure that each existing and new or renewed Arrangement does not violate the Anti-Kickback Statute and/or the Stark Law or the regulations, directives, and guidance related to these statutes (Arrangements Procedures). These procedures shall include the following:
   a. creating and maintaining a database of all existing and new or renewed Arrangements that shall contain the information specified in Appendix A (Arrangements Database);
   b. tracking remuneration to and from all parties to Arrangements;
   c. tracking service and activity logs to ensure that parties to the Arrangement are performing the services required under the applicable Arrangement(s) (if applicable);
   d. monitoring the use of leased space, medical supplies, medical devices, equipment, or other patient care items to ensure that such use is consistent with the terms of the applicable Arrangement(s) (if applicable);
   e. establishing and implementing a written review and approval process for all Arrangements, including but not limited to a legal review by counsel with expertise in the Anti-Kickback Statute and Stark Law and appropriate documentation of all internal controls, the purpose of which is to ensure that all new and existing or renewed Arrangements do not violate the Anti-Kickback Statute and Stark Arrangements Procedures on at least a quarterly basis and to provide a report on the results of such review to the Compliance Committee and Database, internal review and approval process, and other

CORPORATE INTEGRITY AGREEMENT BETWEEN THE
Office of Inspector General
OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES
AND
HILO MEDICAL CENTER
Proposed Scope and Plan

**Phase I**
- Recruitment
- Personal Services Agreements
- Rentals of Office Space and Equipment

**Phase II**
- Loans/guarantees to physicians
- Joint Ventures
- Non-monetary Compensation Arrangements
- Isolated Transactions

**Phase III**
- Physician Payments to Hospital
- Investments

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**Audit Tool – Phase I**

<table>
<thead>
<tr>
<th>Physician Recruitment</th>
<th>Auditor</th>
<th>HIP Ref</th>
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<tbody>
<tr>
<td>Obtain a listing of recruitment arrangements between the hospital and referring physicians</td>
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</tr>
<tr>
<td>Verify that community need was established and documented for each arrangement</td>
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</tr>
<tr>
<td>Verify that a Physician Recruitment Plan was approved by the Board or that the need for the particular recruit was approved by the Board</td>
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</tr>
<tr>
<td>Verify that a valid contract exists for each arrangement</td>
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<td></td>
</tr>
<tr>
<td>Verify each contract complies with applicable laws and HIPPA policies</td>
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</table>

- The arrangement is in writing and is signed and dated by all parties.
- If the physician is joining an Existing Practice, the Existing Practice must also sign the contract.
- Ensure that the benefit will be provided for a period of at least one (1) year.
- The arrangement is not conditioned on the physician’s referral of patients to the hospital.
- The amount of remuneration is reasonable and not based on the volume or value of referrals.
- There are no restrictions for the physician to establish staff privileges at any other hospital or to refer business to any other entities.
- The geographic area served and relocation of the physician practice are in compliance.

- Incorporated into Existing Practice
- The remuneration is passed directly through to or remains with the recruited physician.
- Records of the actual costs of the payment to the Existing Practice and the proceeds through amounts are maintained for a period of at least 5 years.
- The Existing Practice may not impose additional practice restrictions on the recruited physician other than conditions related to quality of care.

- Repayment Provisions
- A prepayment note signed with repayment of prime plus one or two percent
- A security interest taken
- The debt repaid in the provisions of forgiveness satisfied and a 1099 issued
- Any repayment or forgiveness satisfaction, legal action taken to recover the cost
Audit Tool – Phase I

Professional Service Agreements
- Obtain and review Accounts Payable records for any payments made to a physician or physician practice.
- Verify there is a valid contract for professional services.
- Verify the relationship complies with applicable laws and GIFH policies:
  - The agreement is in writing and signed by all parties.
  - The term of the agreement is at least one year.
  - The agreement covers all services furnished by the physician to the hospital.
  - Make a copy of the job description and verify the duties are consistent with the purpose of the agreement.
- Compensation does not exceed fair market value.
  - Identify and evaluate the methodology used to determine fair market value.
  - Verify actual compensation paid is in compliance with the agreement.
  - Obtain copies of the physician’s invoices for 5 months prior to the date of the audit.
  - Verify time sheets are complete and correctly authorized.
  - Verify payments were made prior to time sheet submission.
  - Except in the case of a physician incentive plan, the agreement does not take into account the volume or value of referrals or other business generated.
- Interview medical administration personnel regarding methodology used to assess physician performance.
- Obtain and review copies of evaluations and/or reports.
- Opinion of Counsel submitted to Board to establish rebuttable presumption.

Audit Tool – Phase I

Lease Agreements
- Obtain a summary of lease income from Finance and identify funds received from referring physicians.
- Verify a valid contract exists for each referring physician lease.
- For a sample of contracts verify the relationship complies with applicable laws and GIFH policies:
  - The lease is in writing, signed, and dated by both parties, and specifies the space or equipment covered by the lease.
  - The term of the lease is at least one year.
  - Market lease rate is set over the term of the lease.
  - A fair market assessment has been conducted using an accepted methodology.
  - The space and/or equipment is specified in the lease.
  - The space or equipment leased does not exceed what is reasonable and necessary for the legitimate business purpose of the lease.
  - The space or equipment leased is used exclusively by the lessor when being used (except for prorated payments for common areas).
Attitude is Everything!

- Anger
- Denial and Isolation
- Bargaining
- Depression
- Acceptance

“The next level of motivation, synonymous with self-discipline, is when I do something on my own because I believe I should do it, even if I don’t feel like it. Nobody is making me do it. I do it because I believe I should . . . People are better motivated by values than by compliance.”

If Disney Ran Your Hospital