


Advanced Stark and Fair Market Value: A Progressive Case Study

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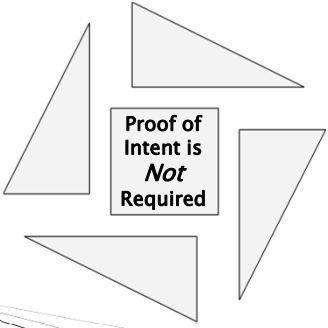
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Stark Act
42 U.S.C. 1395nn

- ▶ The Stark II Act prohibits a physician from making a **Referral**
 - to an **Entity**
 - for the furnishing of a **Designated Health Service**
 - for which payment may be made under Medicare or Medicaid
 - if the physician (or an immediate family member)
 - has a **Financial Relationship** with the entity

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Stark II Act



Proof of Intent is Not Required

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Penalty

Denial of payment or refund; civil money penalties (up to \$100,000) and exclusions from federal and state programs for improper claims or schemes

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Welcome to the City of Runamuck




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The city of Runamuck has two hospitals, St. All-Angels Align Hospital and Green Haven Medical Center. Both hospitals are fierce competitors.

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Phase I Actors




Dr. Kurt Cutthroat



Will Doit
The CEO



Cindy Wright
Compliance Officer



Randy Gray
General Counsel

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Employment Agreements

- ▶ Contracts with physicians or their family members must satisfy Stark II
 - Must Meet Safe Harbor or regulatory exceptions
 - Prohibit billing Medicare for services rendered based on improper referral
- ▶ Anti-Kickback Statute (AKS)
 - Prohibits anyone from knowingly and intentionally offering, paying, or receiving remuneration in exchange for referral of patients for goods or services
 - AKS do not apply to bona fide employment contracts

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Employment Agreements Stark Requirements

- ▶ Written arrangement must be for identifiable services
- ▶ Compensation must be consistent with fair market value (FMV)
- ▶ May not depend on volume or value of referrals
- ▶ Must be commercially reasonable even if no referrals were made

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Tax-Exemption

- ▶ Physician must work full time on a specified schedule
- ▶ Physician must work at a hospital owned location
- ▶ Hospital must receive the professional fees
- ▶ Equipment must be provided by hospital
- ▶ Compensation must be reasonable
- ▶ Conflict of Interest policy

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Relative Value Unit (RVU)

- ▶ A RVU is the measurement that represents the value of:
 - Physician work
 - Practice Expenses
 - Malpractice Expenses
- ▶ Benchmark Data
 - Productivity, Costs and Compensation
 - Weighted average using survey data
- ▶ Work RVU (wRVU):
 - Relative time, effort and skill required for provider in the provision of a procedure

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Orthopedic Surgery: General FY14

	Compensation					
	Valid N	10	25	50	75	90
Sullivan & Cotter	490	\$264,398	\$377,778	\$502,425	\$607,200	\$799,950
MGMA	940	\$282,075	\$400,389	\$520,119	\$682,541	\$934,059
AMGA	852	\$205,252	\$428,282	\$515,759	\$625,054	\$795,993
Blended Annual Rate	2,282	\$249,597	\$405,948	\$514,692	\$644,900	\$853,715
Blended Hourly Rate	2,282	\$120.00	\$195.17	\$247.45	\$310.05	\$410.44

	wRVU's					
	Valid N	10	25	50	75	90
Sullivan & Cotter	300	5,046	6,256	7,891	10,432	13,557
MGMA	769	4,500	6,201	7,981	10,723	13,795
AMGA	596	2,913	6,177	8,026	10,588	13,383
Blended Average	1,665	4,030	6,202	7,981	10,622	13,605

	Compensation per wRVU					
	Valid N	10	25	50	75	90
Sullivan & Cotter	300	\$52.40	\$60.39	\$63.67	\$58.21	\$59.01
MGMA	769	\$62.68	\$64.57	\$65.17	\$63.65	\$67.71
AMGA	596	\$70.46	\$69.33	\$64.26	\$59.03	\$59.48
Blended Average	1,665	\$63.61	\$65.52	\$64.57	\$61.02	\$63.20


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Revise Proposal


- ▶ Revise the proposal to reflect compensation no higher than 50th percentile
- ▶ Term dates
 - Evergreen clauses should be reviewed annually
 - Monitor FMV compensation including any productivity bonuses
- ▶ Include administrative duties as medical director in base compensation
- ▶ AKS does not apply to bona fide arrangements.
 - Avoid perception of hospital relying on physicians' referrals due to low reimbursement or declining volume
- ▶ Payments based on quality measures
- ▶ Covenant not to compete clause

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Phase II Actors



Will Doit
The CEO



Randy Gray
General Counsel



Cindy Wright
Compliance Officer

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Phase II Rural Clinic Space Lease

- ▶ Space leases with physicians must satisfy Stark II
 - if lease creates a Stark financial relationship w/ Hospital
 - ▶ Must meet regulatory exceptions
 - ▶ Otherwise any Medicare (and Medicaid?) referrals from physician-lessee to Hospital are prohibited
- ▶ AKS potentially applies
 - AKS prohibits knowing and willful offer, payment, solicitation or receipt of anything of value to induce referrals of federal health care patients or business
 - Safe harbor for leases available but not required

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Stark II Financial Relationship

- ▶ If lease is between Hospital and physician, there is a direct compensation arrangement and Stark II is triggered
- ▶ If lease is between Hospital real estate subsidiary and physician, Stark II only applies if-
 - There is chain of financial arrangements between Hospital and physician (YES)
 - The compensation arrangement closest to physician (the Lease) varies or takes into account the value or volume of physician's referrals to Hospital (NO but ?)
 - Hospital has reason to know the comp varies with referrals (assume reason to know)

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Stark II Lease Exception

- ▶ The agreement is set out in writing, is signed by the parties, and specifies the premises it covers
- ▶ The term of the agreement is at least 1 year.
- ▶ The space leased does not exceed that which is reasonable and necessary for the legitimate business purposes of the lease and is used exclusively by the lessee when being used by the lessee (and is not shared with or used by the lessor or any person or entity related to the lessor), except common areas if the payments based on pro rate allocation.
- ▶ The agreement would be commercially reasonable even if no referrals were made between the lessee and the lessor.

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Stark Lease Payment Requirements

- ▶ Set in advance,
- ▶ Consistent with fair market value,
- ▶ Not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties;
- ▶ Not determined using a formula based on a percentage of the revenue raised, earned, billed, collected, or otherwise attributable to the services performed or business generated in the office space;

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AKS Lease Safe Harbor

- ▶ The lease agreement is set out in writing and signed by the parties.
- ▶ The lease covers and specifies all of the leased premises.
- ▶ If the lease is for periodic intervals of time, the lease specifies exactly the schedule of such intervals, their precise length, and the exact rent for such intervals.
- ▶ The term of the lease is for not less than one year.
- ▶ The aggregate rental charge is set in advance, is consistent with fair market value and is not determined in a manner that takes into account the volume or value of any federal health care referrals or business otherwise generated between the parties
- ▶ The aggregate space rented is appropriate to accomplish the commercially reasonable business purpose of the rental.

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Fair Market Value

- ▶ \$18/sq ft presumptively the FMV but not necessarily
- ▶ Vacancy premium?
 - Hourly vs. half day?
 - 1000 sq. ft. or only part?
- ▶ FMV rental of equipment and furnishings
- ▶ Supplies?
- ▶ Staff?
- ▶ Utilities?


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Other Alternatives


- ▶ Payment by physician
 - No writing
 - Only needs to be FMV
 - What does "not specifically excepted" by another exception mean?
 - ▶ Exact same language in "isolated transaction" exception
- ▶ Set up hospital based clinic
 - Hospital pays FMV to physician for sessions
 - Physicians don't need to pay rent

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Phase III Actors




Evelyn Free
Chief Financial Officer



Will Doit
The CEO



Cindy Wright
Compliance Officer




Randy Gray
General Counsel

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What Is a Financial Relationship?

Remuneration is defined (42 CFR§ 411.351) as
 “any payment *or other benefit* made directly
 or indirectly, overtly or covertly, in cash or *in
 kind ...*”



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Non-Monetary Compensation Exception

(Applies to *Compensation Relationships*)

- ▶ Compensation (defined as *any benefit*, not including cash or cash equivalents (i.e., gift certificates that may be redeemed in whole or in part for cash), may not exceed an aggregate of \$385 per year per physician as long as:
 - Benefit is not determined based upon volume or value of referrals
 - Benefit is not solicited by physician or anyone affiliated with their practice
 - Maximum cannot be aggregated to make a larger gift to a group

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Non-Monetary Compensation Exception

(Applies to *Compensation Relationships*)

- ▶ The current \$385 limit is updated annually.
- ▶ See: http://cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/CPI-U_Updates.html
- ▶ See Stark Law Resource Page: <http://www.kriegdevault.com/info/stark-act>

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Non-Monetary Compensation Exception

(Applies to *Compensation Relationships*)

- ▶ If a hospital inadvertently exceeds the annual limit, the hospital will still be deemed to be in compliance if i) the value of the excess is no more than 50% of the limit, and ii) the physician returns the excess by the end of the calendar year or within 180 consecutive calendar days, whichever is earlier
 - NOTE: Can only be used once every 3 years
- ▶ Hospitals can now hold 1 formal medical staff event per year without including the cost in this exception

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Non-Monetary Compensation Exception

(Applies to *Compensation Relationships*)

For example:

Cannot give \$1,000 oil painting to 5 physician group and allocate \$200 to each physician



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Non-Monetary Compensation Exception

(Applies to *Compensation Relationships*)

- ▶ Preamble, on Page 16112 of Phase II, stated that “[the Medical Staff Incidental Benefits Exception] was not intended to cover the provision of tangential, off-site benefits, such as *restaurant dinners or theater tickets, which must comply with the exception for non-monetary compensation up to \$385.*” (emphasis added)



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Non-Monetary Compensation Exception

(Applies to *Compensation Relationships*)

CME

“[F]ree CME could constitute remuneration to the physician depending on the content of the program and the physician’s obligation to acquire CME credits.”

Phase II, page 16114

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Medical Staff Incidental Benefits Exception

(Applies to *Compensation Relationships*)

- ▶ Items or services used on the hospital's campus may be given to members of its medical staff if:
 - Item or service is provided to all members in the same specialty without regard to volume or value of referrals
 - Item or service is provided only during periods when the medical staff members are making rounds or involved in other services that benefit the hospital and its patients

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Medical Staff Incidental Benefits Exception

(Applies to *Compensation Relationships*)

- ▶ The item or service is reasonably related to the delivery of medical services at the hospital
- ▶ Each item or service is less than \$32 per benefit (updated annually)



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Medical Staff Incidental Benefits Exception

(Applies to *Compensation Relationships*)

- ▶ The exception specifically recognizes that "internet access, pagers, or two-way radios, used away from the campus **only to access** hospital medical records or information or to access patients or personnel who are on the hospital campus, as well as the identification of the medical staff on a hospital Web-site or in hospital advertising, will meet the single "**on campus**" requirement..." (emphasis added)



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Why Is Compliance So Hard?

- ▶ Tracking of benefit.
- ▶ Who is responsible for oversight?
- ▶ How do you allocate (focus is usually on value of benefit to receiving physician)?
- ▶ Does a "Will Work for Food" written agreement signed by the parties meet other exceptions?
- ▶ Unified gifts cannot be prorated.
- ▶ Non-monetary benefits are the most frequent financial arrangements between DHS entities and referring physicians.






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Benefits Provided by St. All- Angels Align Hospital

- ▶ Dinners at restaurants 
- ▶ \$10,000 donation to charity golf outings with physician participation 
- ▶ Entertainment at sporting events, local theater, and symphony 

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Benefits Provided by St. All- Angels Align Hospital

- ▶ Free lunches (with education, without education, with note thanking the physicians for their business) 
- ▶ Board retreat attended by three independent physicians and their spouses 
- ▶ Free meals to medical staff members in physician lounge 

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Compliance Forms

- 1) Stark Audit Tool
- 2) Gifts/Benefits Tracking Form - Physicians
- 3) Physician Contract Checklist
- 4) Stark Production Checklist
- 5) Rent Tracking

<http://www.kriegdevault.com/info/stark-act>

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