



## Effective Compliance Oversight for Physician Financial Arrangements

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**Robert A. Wade, Esq.**

Partner  
Barnes & Thornburg LLP  
100 N. Michigan Street, Suite 700  
South Bend, IN 46601  
Telephone: (574) 237-1107  
Bob.Wade@btlaw.com

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# Overview

- Applicable Statutes/Regulations compliance should consider for physician financial arrangements.
- Pitfalls compliance should consider when evaluating volume/value of referrals prohibition.
- Fair Market Value vs. Commercial Reasonableness compliance oversight.
- Best practices during operation of financial arrangements.



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## Applicable Statutes/Regulations

### MEDICARE AND MEDICAID FRAUD AND ABUSE LAW

#### ("ANTI-KICKBACK STATUTE")

42 U.S.C. § 1320a-7b

- Under the Anti-kickback Statute, it is illegal to knowingly or willfully:
  - offer, pay, solicit, or receive remuneration;
  - directly or indirectly;
  - in cash or in kind;
  - in exchange for;
    - referring an individual; or
    - furnishing or arranging for a good or service; and
- for which payment may be made under Medicare or Medicaid.



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## Applicable Statutes/Regulations

### PENALTY

**Fined  
not more than \$25,000 or  
imprisoned for not more  
than  
five (5) years  
or both**



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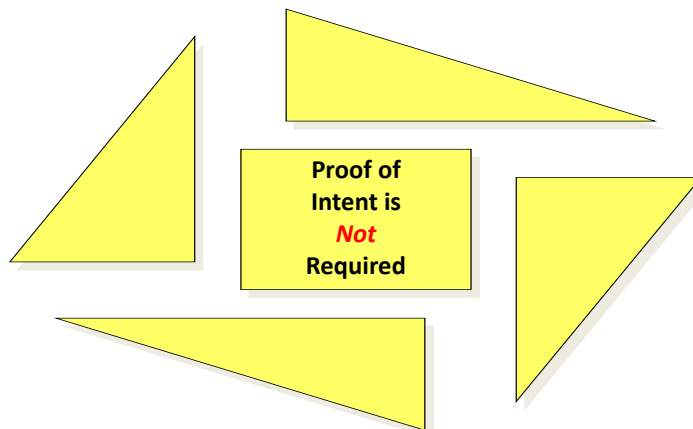
## Applicable Statutes/Regulations

### 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
  - if the physician (or an immediate family member)
  - has a **Financial Relationship** with the entity

## Applicable Statutes/Regulations

### Stark II Act



## Applicable Statutes/Regulations

# 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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## Applicable Statutes/Regulations

# Exceptions

- Permitted **Ownership** and Compensation Arrangements:
  - Physician Services
  - In-office Ancillary Services
  - Services to Members of Prepaid Health Plans
  - Academic Medical Centers
  - Implants Furnished by ASC
  - Dialysis-related Drugs Furnished by End Stage Renal Disease Facility
  - Preventative Screening Tests, Immunizations and Vaccines
  - Eyeglasses and Contact Lenses Following Cataract Surgery
  - Intra-family Rural Referrals\*



\*New Phase II (7/26/04 effective date)



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## Applicable Statutes/Regulations Exceptions

- Permitted **Ownership** Interests:
  - Publicly-traded securities
  - Mutual Fund Investment
  - Rural Provider (75% of DHS to Rural Residents)
  - Hospitals in Puerto Rico
  - Hospital Ownership (whole, not department or floor)
    - Applies only to Physician-owned hospitals up to December 31, 2010 – such hospitals cannot i) Expand physician ownership percentage, or ii) Expand capacity such as patient rooms, procedure rooms, etc.



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## Applicable Statutes/Regulations Exceptions

- Permitted **Compensation** Arrangements:
  - Rental of Office Space
  - Rental of Equipment
  - Employment Relationships
  - Personal Service Arrangement
  - Physician Recruitment
  - Isolated Transactions
  - Services Unrelated to Provision of Designated Health Services
  - Hospital-affiliated Group Practice Arrangements
  - Fair Market Value Payments Made by Physicians for Items and Services (i.e., clinical laboratory services)



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## Applicable Statutes/Regulations Exceptions

- Permitted **Compensation** Arrangements:
  - Charitable Donations by Physician
  - Non-monetary Compensation (Benefits) up to \$385 Per Year
  - Fair Market Value Compensation
  - Medical Staff Incidental Benefits
  - Risk-sharing Arrangements (i.e., withholds, bonuses, risk pools)
  - Compliance Training
  - Indirect Compensation Arrangements
  - Referral Services



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## Applicable Statutes/Regulations Exceptions

- Permitted **Compensation** Arrangements:
  - Obstetrical Malpractice Insurance Subsidies
  - Professional Courtesy
  - Retention Payments in Underserved Areas
  - Community-wide Health Information Systems
  - Electronic Prescribing Items and Services
  - Electronic Health Records Items and Services



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## Applicable Statutes/Regulations

### Bona Fide Employment Exception

(Applies to *Compensation* Relationships)

- Employment is for identifiable services;
- Amount of remuneration under employment is:
  - Consistent with *fair market value*, *reasonable* and determined through *arm's length negotiations*
  - Not determined in manner which *takes into account volume or value* of referrals by referring physician; and
  - Remuneration is provided pursuant to agreement that would be commercially reasonable *even if no referrals* were made to employer



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## Applicable Statutes/Regulations

### Bona Fide Employment Exception

(Applies to *Compensation* Relationships)

- Productivity bonuses can be paid if based on services *performed personally* by the physician (i.e., worked RVUs)



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## Applicable Statutes/Regulations

### Required Referrals

(Applies to *Compensation* Relationships)

- Requiring referrals
- An employer **can require** an employee to refer to a particular provider, practitioner or supplier so long as:
  - the compensation is set in advance
  - the compensation is fair market value
  - the referral requirement
    - is in writing signed by the parties
    - is not required if the patient expresses a preference for a different provider
    - does not require physician to refer if patients' insurance does not cover services at required providers
    - does not require physician to refer if the physician believes that the required referral is not in the patient's best medical interest



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## Applicable Statutes/Regulations

### Required Referrals

(Applies to *Compensation* Relationships)

- Requiring referrals

The required referrals relate **solely** to the physician's services covered by the scope of the employment and the referral requirement is reasonably necessary for the legitimate business purposes of the compensation arrangement between the employer and the employee



**Bad**  
Medical  
Director -  
Inpatient



**Good**  
Employed  
Primary Care  
– Inpatient



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## Volume/Value Pitfalls

**Volume:** The most commonly used productivity compensation measures, in order, are the following: wRVUs, collections, net income, and patient visits.<sup>1</sup>

*Focus is on number of referrals.*

<sup>1</sup>2011 Physician Compensation and Productivity Survey by Sullivan, Cotter & Associates, Inc. Of those that use productivity based incentive measures, 74% use work RVUs.



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## Volume/Value Pitfalls

**Value:** Procedures/services/tests/evaluations that have higher reimbursement have greater value when compared with lower reimbursed procedures/services.

*Focus is on compensation methodology that discourages Medicare, Medicaid and Charity Care (Tax-exempt/State supported/sponsored entities)*



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## Volume/Value Pitfalls

**Value:** What about compensation based on “value” of healthy patient population not tied to productivity of personally performed services?



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## Volume/Value Pitfalls

Government and Health Care Organizations are placing a greater concentration, and thus a greater percentage of compensation, based upon **value** of medical services as opposed to traditional productivity/**volume** compensation arrangements.



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## Volume/Value Pitfalls

- Compensation areas of focus for **value** include:
  - Quality
  - Access
  - Patient Panel
  - Outcomes
  - Appropriate site of services (Urgent Care vs. ED)
  - Inpatient Admissions/Readmissions
  - Screening/Counseling (Blood Pressure, Weight Management, Smoking)

I am currently seeing up to 20% of compensation focusing on **Value**.



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## Volume/Value Pitfalls

### Quality:

- Education
- Value Based Care
  - NGACO RAF, Medicaid peds RAF, Medicaid quality, Saturday Access
- Quality measures
  - Adult: BMI(G), HTN, CCS, BCS(G), Depr Screen(G), DM composite, Pneumovax(G)
  - Peds: Immun by 2(G); develop screen, asthma med control; depr screen(G); BMI(G); HTN screen(G)
- Innovation measures
  - Video visits, RIE, pediatric collaboratives



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## Volume/Value Pitfalls

### Quality:

#### ➤ Compensating for Access:

- Maintaining office hours outside of the traditional 8 am – 5 pm
- Managing practice to permit scheduling of appointment within two business days (i.e. maintaining a schedule so that 20% of the schedule is available two business days before requested appointment).
- Maintaining Saturday office hours.
- Keeping patient panel open.



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## Volume/Value Pitfalls

An example of a Panel Incentive is as follows:

Age Adjusted Panel Size per clinical FTE	Incentive per clinical FTE
2,500	\$ 25,000
2,750	\$ 30,000
3,000	\$ 35,000
3,250	\$ 40,000
3,500	\$ 45,000
3,750	\$ 50,000
4,000	\$ 55,000
4,250	\$ 60,000

**Age adjusted**, by way of example, could include a 20% reduction for patients below the age of 18 and a 20% increase for patients above the age of 65.



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## Volume/Value Pitfalls

- Examples of non-productivity quality indicators, based upon the percentage of patients receiving wellness services, based upon a percentage of the patient panel receiving such non-productivity services, is as follows:
  - Breast cancer screening
  - Rectal cancer screening
  - Depression screen
  - Pneumonia vaccination
  - High blood pressure consultation
  - Cholesterol screening
  - Aspirin utilization for patients with coronary heart disease
  - Childhood immunizations
  - Tobacco use screening and cessation counseling
- Example: Credit received for 95% plus compliance.



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## Volume/Value Pitfalls

Fair market value in the **aggregate** is still a requirement in non-productivity compensation models due to the requirements under the exceptions under the Stark Law and the safe harbors under the Anti-Kickback Statute.



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## Volume/Value Pitfalls

### Volume or Value Analysis

- Cannot take into account volume or value.
- Four levels of volume and value:
  - i. Paying a doctor for each referral of designated health services. **Clearly prohibited.**
  - ii. Creation of a bonus pool that varies with either the gross revenue or net margin of a service line. Division of bonus pool based upon each physician's referrals of DHS. **Clearly prohibited.**
  - iii. Creation of a bonus pool that varies with either the gross revenue or net margin of a service line. Division of bonus pool based upon percentage of work RVUs in comparison with aggregate wRVUs of all applicable physicians. **Halifax case, but unlitigated.**
  - iv. Fixed bonus pool or bonus based upon overall success of AMC, both financially and based upon quality metrics. **Unlitigated.**



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## Volume/Value Pitfalls

### United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center, et al.

#### Allegations:

- Lawsuit brought by the former Director of Physician Services at Halifax Health alleges that contracts with six (6) oncologists violated the Stark law and other relevant Medicare laws.
- The government alleged that the prohibited referrals resulted in the submission of 74,838 claims and overpayment of \$105,366,000.



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## Volume/Value Pitfalls

### Halifax Hospital Medical Center

- DOJ asserted that paying physicians more than the professional collections they generate exceeds FMV, is not commercially reasonable, and takes referrals into account:

"Given that each neurosurgeon was paid total compensation that exceeded the collections received for neurosurgical physician services, Defendants could not reasonably have concluded that the compensation arrangements in those contracts were fair market value for the neurosurgical services or were commercially reasonable."

- But, there is no requirement that providing physician services must be profitable:
  - If compensation is FMV and is not adjusted for referrals, it should satisfy the Stark Law
  - Some service lines have unprofitable payor mixes or low demand
  - CMS recognizes the legitimacy of subsidizing physician compensation, e.g. in the E.D.
  - Likewise, call coverage and hospitalist services often require subsidies



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## Volume/Value Pitfalls

### Halifax Hospital Medical Center

- Executed contracts with six medical oncologists that included an incentive bonus that improperly included the value of prescription drugs and tests that the oncologists ordered and Halifax billed to Medicare.
  - Bonus Pool = 15% of Halifax Hospital's "operating margin" from outpatient medical oncology services (*i.e.*, pool includes revenue from "designated health services" referred by oncologists)
  - Alleged that pool did not comply with Employment Exception (1) FMV and (2) Volume/Value referral prohibition
  - Share of pool paid to individual oncologists was based on each individual physician's personal productivity, not referrals
  - However, pool included "profits" from services referred, but not personally performed by oncologists.



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## Volume/Value Pitfalls

### Halifax Hospital Medical Center

Allegation focused on pool *creation* vs. pool *division*



VS.



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## Volume/Value Pitfalls

### Halifax Hospital Medical Center

- Complaint alleged that Halifax paid three neurosurgeons more than fair market value for their work.
  - Bonus = 100% of collections after covering base salary, no expense sharing
  - Total Cash Compensation = As much as double neurosurgeons at 90<sup>th</sup> percentile of FMV.
  - What about productivity to TCC analysis?



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## Volume/Value Pitfalls

### Halifax Hospital Medical Center

- Bonus = 100% of collections after covering base salary, no expense sharing
  - Total Compensation = As much as double neurosurgeons at 90<sup>th</sup> percentile

AMGA 90 <sup>th</sup>	MGMA 90 <sup>th</sup>	Dr. R. K.	Dr. WK.	Dr. FMV.
\$844,703	\$1,200,051	\$1,725,302	1,160,163	1,897,524

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## Volume/Value Pitfalls

### United States *ex rel.* Drakeford v. Tuomey Healthcare System, Inc.

- In 2003, several local specialty groups told Tuomey they planned to perform surgical procedures in-office instead of at Tuomey's 266-bed hospital
- To allegedly avoid a reduction in surgical case volume, Tuomey employed the 19 specialists as part-time employees
- Each of the 10-year employment contracts included essentially the same terms.
  - Physicians were required to perform outpatient procedures at a Tuomey hospital or facilities owned by Tuomey
  - Tuomey was responsible for billing and collections from patients and third-party payers, including Medicare and Medicaid
  - Tuomey compensated the physicians with annual base salaries that hinged on Tuomey's net cash collections for outpatient procedures
  - The physicians were also eligible for productivity bonuses equal to 80 percent of the net collections, along with an incentive bonus that could total up to 7 percent of the productivity bonus
  - Finally, the contracts also included a non-compete clause, prohibiting the specialists from competing with Tuomey during the 10-year term and two years after the contract expired



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## Volume/Value Pitfalls

### Tuomey Healthcare System, Inc.

- Tuomey claimed that it had acted in good faith and sought/relied on advice from various outside law firms and consultants in connection with the employment agreements
- Tuomey indicated that it believed the employment agreements were commercially reasonable and not in excess of fair market value given a shortage of physicians in the community
- However, the Government discovered additional consultant reports suggesting potentially conflicting opinions as to the regulatory risk of the employment agreements
- Legal/FMV Shopping????



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## Volume/Value Pitfalls

### Tuomey Healthcare System, Inc.

- The valuation Tuomey relied upon indicated productivity levels of the physicians were between the 50<sup>th</sup> and 75<sup>th</sup> percentiles
- Compensation levels exceeded the 90th percentile
- But, the valuation did not take into account any full time benefits provided
- In addition to this valuation, Tuomey sought out the expertise of a former Department of Health and Human Services attorney who had experience with the Stark Law and who advised them the physician contracts were problematic and the terms could potentially expose liability under the Stark Law

*Risk Area: Production vs. Compensation alignment with benchmark data*



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## Volume/Value Pitfalls

### Tuomey Healthcare System, Inc.

➤ Major Question regarding the volume or value of referrals:

- Here is how the Fourth Circuit interpreted the compensation structure when remanding the case back to district court:

*"It stands to reason that if a hospital provides fixed compensation to a physician that is **not based solely on the value of the services the physician is expected to perform**, but also takes into account additional revenue the hospital anticipates will result from the physician's referrals, that such compensation by necessity takes into account the volume or value of such referrals."*

➤ Important Takeaways from Tuomey:

- Virtually all FCA cases are resolved through settlement agreements due to potential ramifications of losing – unusual that this case went to trial
- Physician employment does not necessarily insulate agreements from Stark liability
- If a proposed arrangement appears to have been developed in response to the fear of losing a referral stream, the government may look closely at issues of commercial reasonableness
- Long-term arrangements should be reviewed periodically for compliance
- Providers cannot blindly follow a fair market value or commercial reasonableness determination, its important to look at the analysis from a legal perspective



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## Fair Market Value/Commercial Reasonableness Oversight

➤ Typical pathway for physician compensation arrangements include:

1. Organization's **Operations** identifying needed physician financial arrangement.
2. Consultation with the **Finance** Department regarding a) proposed financial terms, b) fair market value documentation issues, and c) analyzing the commercial reasonableness of i) proposed financial arrangement from an operations perspective, and ii) compensation terms.



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## Fair Market Value/Commercial Reasonableness Oversight

3. Consultation with **Legal** Department regarding a) legal structure of compensation arrangement to comply with the Anti-Kickback Statute and Stark Law, and b) fair market value/commercial reasonableness analysis.
4. The **Compliance** oversight of the operational, financial, and legal requirements in 1-3 above.
5. The **Audit** structure for oversight of the compensation arrangement.
6. Approval by Physician Arrangements Review **Committee** of FMV and Commercial Reasonableness.

## Fair Market Value/Commercial Reasonableness Oversight

### Legal/Regulatory View of Fair Market Value

According to the Stark Act, **fair market value** is “the value in arm’s-length transactions, consistent with the general market value.”



## Fair Market Value/Commercial Reasonableness Oversight

### Legal/Regulatory View of Fair Market Value

“General Market Value” means the price that an asset would bring as a 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.

**42 C.F.R. § 411.351**



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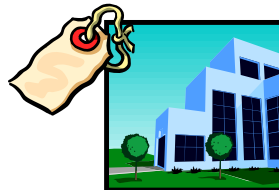
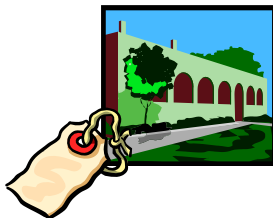


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## Fair Market Value/Commercial Reasonableness Oversight

### Legal/Regulatory View of Fair Market Value

The Stark Act also defines **Fair Market Value** as the market price at which bona fide sales have been consummated for like type assets in a particular market.



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## Fair Market Value/Commercial Reasonableness Oversight

### Legal/Regulatory View of Fair Market Value

For real estate, the Stark Act states that **fair market value** is “the value of rental property for general commercial purposes (not taking into account its intended use). In the case of a lease of space, this value may not be adjusted to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor when the lessor is a potential source of patient referrals to the lessee.”



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## Fair Market Value/Commercial Reasonableness Oversight

### Legal/Regulatory View of Fair Market Value

A Fair Market Value Safe Harbor for **hourly rates** was developed under Stark in the Phase II regulations.

Safe harbor deleted in Phase III regulation. However, OIG stated that safe harbor methodology is still a prudent documentation process.



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## Fair Market Value/Commercial Reasonableness Oversight

### Fair Market Value Safe Harbor Deleted

An **hourly rate** is deemed to be fair market value if it meets one of the following two tests:

- 1) Hourly rate is less than or equal to the average hourly rate for emergency room physician services in the market provided there are at least three hospitals providing emergency room services in the market.



## Fair Market Value/Commercial Reasonableness Oversight

### Market Value Safe Harbor Fair Deleted

An **hourly rate** is fair market value if it meets one of the following two tests:

- 2) Hourly rate is determined by averaging the 50 percentile national compensation level with the same physician specialty in at least four of the following survey, and dividing by 2000.

- Sullivan, Cotter & Associates, Inc. - Physician Compensation and Productivity Survey
- Hay Group - Physician's Compensation Survey
- Hospital and Health Care Compensation Services - Physician Salary Survey Report
- Medical Group Management Association (MGMA) - Physician Compensation and Productivity Survey
- ECS Watson Wyatt - Hospital and Health Care Compensation Report
- William M. Mercer - Integrated Health Networks Compensation Survey

## Fair Market Value/Commercial Reasonableness Oversight

### Legal/Regulatory View of Fair Market Value

- Stark regulations state that the definition of FMV “is qualified in ways that do not necessarily comport with the usage of the term in standard valuation techniques and methodologies.”
- **Stark example:**  
Exclusion of market comparables between parties in position to refer
- **Stark example:**  
FMV can be established by “any method that is commercially reasonable.”
- **OIG Anti-kickback statute example:**  
Footnote 5 to Advisory Opinion 09-09 cautioning the use of the Discounted Cash Flow (DCF) method for an ASC valuation



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## Fair Market Value/Commercial Reasonableness Oversight

Typical third party surveys include:



- **Sullivan, Cotter & Associates, Inc.** - Physician Compensation and Productivity Survey;
- **HayGroup** - Physicians Compensation Survey;
- **Hospital and Healthcare Compensation Service** - Physician Salary Survey Report;
- **Medical Group Management Association** - Physician Compensation and Productivity Survey;
- **ECS Watson Wyatt** - Hospital and Health Care Management Compensation Report
- **William M. Mercer** - Integrated Health Networks Compensation Survey



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## Fair Market Value/Commercial Reasonableness Oversight

### Data Example 1:

- Single Tier Model with a Guaranteed Cash Compensation of \$175,000 with additional incentive compensation of \$40 per RVU above 4,500 RVUs work.
- Base Compensation, RVU production and compensation per RVU all benchmarked at 50th percentile.

Percentile	Cash Compensation	RVUs	Compensation per RVUs
25	125,000	3,500	\$35
50	175,000	4,500	\$40
75	225,000	5,500	\$41
90	300,000	6,500	\$46



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## Fair Market Value/Commercial Reasonableness Oversight

### Data Example 2:

- Multiple Tiered Model
- 100% RVU Production

RVUs worked	Compensation per RVU
4,500 and below	\$30
4,501 – 5,500	\$35
5,501 – 6,500	\$40
6,501 and above	\$42

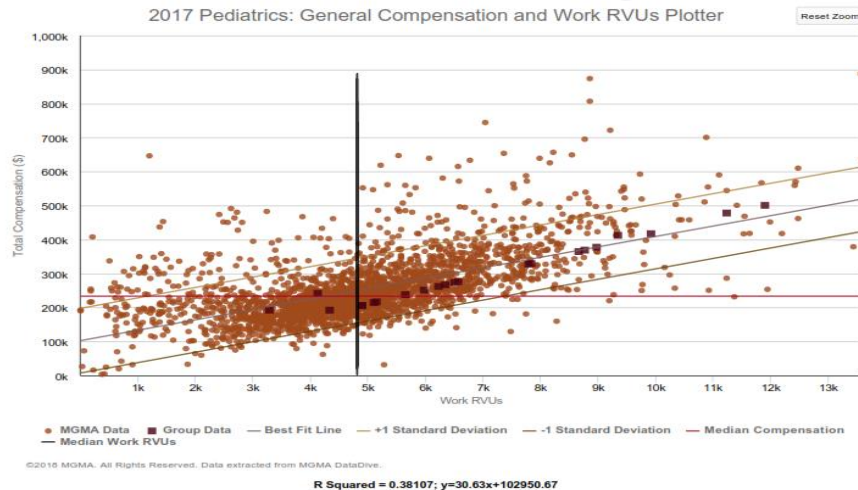


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## Fair Market Value/Commercial Reasonableness Oversight



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## Fair Market Value/Commercial Reasonableness Oversight



- Be careful with the compensation per wRVU benchmark data.
  - 90<sup>th</sup> percentile physicians, based upon productivity, do not earn compensation per wRVU at the 90<sup>th</sup> percentile.
  - For most specialties, compensation per wRVU should remain approximately at the 50<sup>th</sup> percentile. Careful review if compensation per wRVU exceeds 60<sup>th</sup> percentile.



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## Fair Market Value/Commercial Reasonableness Oversight

Specialty: Orthopedic Surgery			
	50 <sup>th</sup>	75 <sup>th</sup>	90 <sup>th</sup>
wRVUs*	7,981	10,723	13,795
x \$63.54(50 <sup>th</sup> )*	\$507,113	\$681,339	\$876,534
x \$105.18 (90 <sup>th</sup> )*	\$839,442	\$1,127,845	\$1,450,958
Benchmark Range*	\$520,119	\$682,541	\$943,059

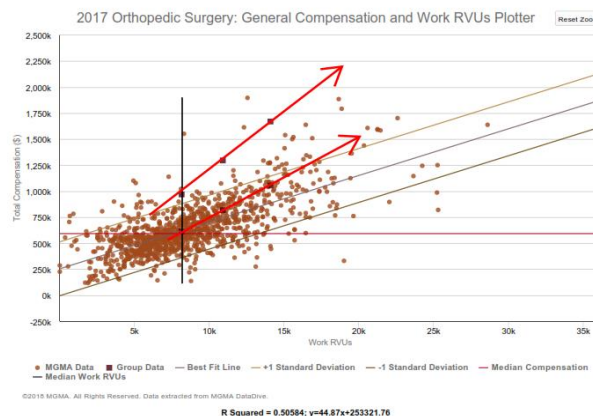


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## Fair Market Value/Commercial Reasonableness Oversight



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## Fair Market Value/Commercial Reasonableness Oversight

- Fair market value is based upon the specific financial arrangement being entered into by the parties. Factors that can cause compensation to exceed 90<sup>th</sup> percentile include:
  - Extremely high productivity
  - High demand/low supply for specialty
  - Thought leader in specialty
  - Historic compensation above 90<sup>th</sup> percentile for *personally performed services* (do not include revenue from ancillary services or midlevel providers)
  - Super sub-specialization or multi-specialty
  - Nationally renowned program
- See Worksheet



## Fair Market Value/Commercial Reasonableness Oversight

- The **aggregate** compensation versus each **component** of compensation.
- Benchmark data includes all sources of compensation from respondents
- When analyzing fair market value compensation, understand all sources of compensation.
- Can one physician really be more than a 1.0 FTE?
- Focus on number of hours worked by physician.



Employment

Research

On-Call

Medical Staff Officer

Medical Directorship

## Fair Market Value/Commercial Reasonableness Oversight

### ➤ Who Determines FMV?

- Legal Department
- Compliance
- Outside Third Party FMV Firm
- Outside Legal Counsel
- Finance Department
- Executive Leadership
- Physician Leadership
- Board/Trustees



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## Fair Market Value/Commercial Reasonableness Oversight

- Once survey is complete, the request routes for FMV review.
- FMV department performs an initial fair market value assessment to determine if we already have an FMV opinion that covers the proposed compensation arrangement.
- If no existing FMV, the FMV department reviews the proposal to determine if the proposed compensation is at or below the [75<sup>th</sup>] percentile annual salary for the appropriate specialty according to national benchmark data.
- If the proposed compensation exceeds the [75<sup>th</sup>] percentile compensation benchmark, then the proposed compensation is sent for an outside FMV/commercial reasonableness opinion.

**Note:** *Outside FMV defensibility review is dependent on the risk tolerance of the organization.*



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## Fair Market Value/Commercial Reasonableness Oversight

### Commercial Reasonableness Questionnaire

(from Halifax Health)

1. What is the business purpose of this arrangement?
2. Does this arrangement further Halifax Health's mission and/or pursuit of strategic goals?
3. Justify the amount of services
4. Can the function be performed by a non-physician? If yes, discuss why you are seeking a physician.
5. If services are rendered on an hourly or part time basis, are there mechanisms in place to ensure the services are actually performed by the physician? If yes, please describe them. Otherwise, respond with "full time".
6. Is there a continued need for the services? If yes, please describe.
7. Are these services duplicated elsewhere? If so, does this new agreement create an excessive supply of services given our facility's need?



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## Fair Market Value/Commercial Reasonableness Oversight

- Separate analysis from FMV
- Commercial reasonableness is more of a “**qualitative**” analysis than quantitative
- Many FMV reports specifically exclude comment or opinion regarding CR
- Who determines if the transaction is CR? – often nobody knows or is asking
- CR opinion provides a “pre-transaction” document demonstrating thought regarding CR
- Seeing more government activity in this area



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## Fair Market Value/Commercial Reasonableness Oversight

- The following services may not be commercially reasonable:
  - Two medical directors over a department when only one is needed.
  - Paying the physician for questionable consulting services.
  - Renting a piece of equipment full-time when only used once a month (assuming rental for one day is less than full-time rental).
  - Purchase of physician's medical office building with no intention to use building.
  - Large net losses to the hospital.
  - Rate may be FMV, but fail CR test.



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## Fair Market Value/Commercial Reasonableness Oversight

### United States ex rel. Reilly v. North Broward Hospital District, et al.

- Allegations:
  - The relator alleged that the compensation was excess of fair market value and commercially un-reasonable, because it was over the 90th percentile of total cash compensation as published in MGMA physician compensation surveys, and generated substantial practice “losses” for Broward
  - Broward tracked and evaluated “inpatient contribution margins” and “outpatient contribution margins”



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## Fair Market Value/Commercial Reasonableness Oversight

### North Broward Hospital District

- For instance: One orthopedic surgeon was alleged paid at least \$1,391,184.23 in 2008 and \$1,557,984.40 in 2009
- MGMA 90<sup>th</sup> percentile compensation for orthopedic surgeons in the Southern U.S. was \$1,209,569 in 2008
- After evaluating the net revenue and expenses of the practice, Broward faced a **net loss** of \$791,630
- However after tracking “inpatient contribution margins” and “outpatient contribution margins” this surgeon contribution margin was a profit of \$867,326



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## Fair Market Value/Commercial Reasonableness Oversight

### North Broward Hospital District

- The physicians’ compensation was not financially self-sustaining from professional income alone, but would be self-sustaining if one added the value of facility fees, which Broward tracked
- The whistleblower argued that Broward’s “Contribution Margin Reports,” continually tracked referral profits and was used to **“take into account the volume and value of referrals”** when establishing compensation
- The complaint also alleged that Broward pressured physicians to limit charity care, even though Broward is a public entity, and to keep referrals in-house, even when physicians believed the patient’s care needs were better served by another facility
- Compliance Focus: How to use Contribution Margin Reports



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## Fair Market Value/Commercial Reasonableness Oversight

### North Broward Hospital District

➤ Because of the settlement we don't know DOJ's thoughts on:

- The propriety of compensation that, in combination with practice overhead expenses, is in excess of collections from the physician's personally performed services
- But we do know that a DOJ fair market value expert has asserted in litigation that physician arrangements, even for employed physicians, for departments that "lose" money are commercially un-reasonable while conceding that there is no statutory or regulatory basis for such an assertion
- And the DOJ has asserted that hospitals that tolerate practice "losses" because of the value of the employed physician's referrals to the hospital are deemed by the qui tam bar to be suspect



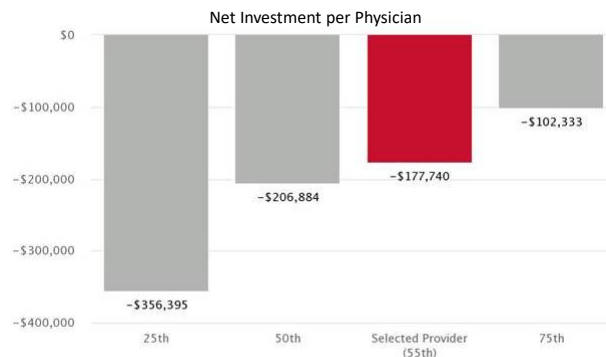
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## Fair Market Value/Commercial Reasonableness Oversight

### Average Loss per Hospital Employed Physician



Medical Group Strategy Council's 2017 Investment Benchmarking, Advisory Board Company



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## Best Practices/Compliance Oversight

- Approval Process – Compliance needs to be involved!
- Payment Oversight – Who Approves/Monitors?
  - W-2 Employees
  - 1099 Independent Contractors
  - Expense Reimbursement



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## Best Practices/Compliance Oversight

- Are all benefits captured/monitored?
  - Non-monetary (i.e., gifts, tickets, meals, advertising)
  - Medical Staff Stipends
  - Services (i.e., cleaning, parking, IT, telephone patient scheduling)
  - Loan Forgiveness/Repayment
    - Signing Bonuses
    - Recruitment Incentives
    - Tuition Reimbursement



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## Best Practices/Compliance Oversight

- Periodic Audits/Reviews
  - 10% of Physician Financial Armaments
    - Contract/Agreement
    - Service Documentation (i.e., Time Studies)
    - Payment Records
    - Productivity Calculations – Check Accuracy
    - Expense Reimbursement Records
    - Non-monetary Compensation/Benefits
    - Fair Market Value Documentation
    - Commercial Reasonableness Checklist
  - Are there Isolated or Systemic Issues?
  - Part of Compliance Effectiveness Review



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