Overview of Fair Market Value
HAVE YOU EVER HEARD ANY OF THESE?

- I’ve never seen a compensation plan quite like that one. . .
- Wow, that proposed compensation is off the charts!! I sure hope the doctor’s production is too.
- Hmmmm, we might have to get creative with our analysis to fit that quality compensation into a FMV range.
- We did that back in the 1990s and can do it again.
- Sure, I can give a commercial reasonableness opinion, too, it’s the same as FMV.
- So, you want to pay $2000/day for call coverage because that is what the doctors said their colleagues made in another state?
- Well, it doesn’t really matter, all compensation is the same.
- You want to pay the same recruitment stipend to a Fellow and to a Resident?
- You don’t know what to pay the local PCP you hired to help you plan your cancer COE?
- You told them you would pay them what they are making in their practice today.
VALUATION OF COMPENSATION AND CONTRACTUAL ARRANGEMENTS

• Compliance is a continuous process, including ensuring all physician arrangements are within FMV and Commercially Reasonable.

• Common arrangements:
  - Employment arrangements
  - Professional service arrangements
  - Physician on-call coverage agreements
  - Medical directorships
  - Service line and management/co-management arrangements
  - Leasing and joint venture relationships
• Defining factors of fair market value (FMV)
  ▪ IRS Revenue Ruling 59-60 (1959)
    o “The price at which the property would change hands between a willing buyer & a willing seller when the former is not under any compulsion to buy & the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts”
Defining factors of fair market value (FMV)

- Stark regulations
  - “The fair market price is the price at which bona fide sales have been consummated for assets of like type, quality & quantity in a particular market at the time of acquisition” (420 CFR 411.351)
  - “The methodology must exclude valuations where the parties to the transactions are at arm’s length but in a position to refer to one another” (69 F.R. 16053)
The Stark Law is a civil statute prohibiting physicians from referring Medicare patients for certain designated health services (DHS) to an entity with which the physician or a member of the physician’s immediate family has a financial relationship – unless an exception applies.

Several exceptions exist – all of which call for compensation to be consistent with Fair Market Value.

Stark is a strict liability statute.

Stark violations trigger possible:

- Repayment requirements
- Civil monetary penalties
- Potential exclusion from Medicare and Medicaid programs
- Prosecution under the False Claims Act (including criminal penalties)
The Anti-Kickback Statute is a criminal statute prohibiting any knowing or willing solicitation or acceptance of any type of remuneration to induce referrals for health services that is reimbursed by a government health program.

- Requires proof of intent
- More broad than Stark
- Punished by up to $25,000 in fines and five years jail time

Tax exempt rules prohibit benefits to be inured to “disqualified” persons

- Creates penalties for excess compensation
- Effectively prohibits “profit-sharing” of hospital departments
- Includes threat of intermediate sanctions and excise taxes
- Could also lead to revocation of an entity’s tax exempt status
Tuomey health care

- Hired physicians on part-time basis for surgical procedures with 10-year contracts
  - Paid base compensation plus fees that took value of referrals into account
- $237 million in penalties paid by Tuomey
United States ex. rel., Kaczmarczyk v. SCCI Hospital Ventures

- Argued that a Texas hospital failed the commercial reasonableness test
  - Low patient volume yet hired multiple medical directors
  - Duties performed overlapped resulting in double pay
- $7.5 million in penalties paid by SCCI
RISKS OF NOT HAVING VALUATION POLICIES & PROCEDURES

Paying twice or overpaying for services provided

Paying for services not needed or not actually performed

Services performed by overqualified individual

Penalties

• Strict liability
• $15,000 per violation under Stark Law
• $25,000 per violation under Anti-Kickback Statute
• Loss of ability to serve federally insured patients
IMPLICATIONS OF STARK STANDARD OF VALUE

• Avoid “investment value”
  - No consideration of downstream referrals
  - No consideration of hospital rates
  - No consideration of specific economies of scale
  - Limitations on use of opportunity cost

• Deal must make sense between purely arms-length players
FAIR MARKET VALUE

• Clinical vs Administrative Rates
  ▪ Compensation paid for clinical work must be FMV for clinical work and the rate paid for administrative work must be FMV for administrative work.
    ○ “We note that the fair market value of administrative services may differ from the fair market value of clinical services” (72 F.R. 51016)
COMMON COMPLIANCE CONCERNS FOR PHYSICIAN ARRANGEMENTS

- Upfront FMV analysis of compensation
- Stacked arrangements / “impossible day” issues
- Departure from original deal terms
- Lack of systematic review for physician contracts, including real estate
- Calculation of actual physician wRVUs
- Use of mid-level providers in compensation arrangements
- DHS/ancillary credit in compensation arrangements
- Fees paid for undocumented or under-documented services
- Billing, coding & documentation review
VALUE IN FMV REPORTS

• Clear support for regulated transactions
• Provides a basis for belief that referrals are arms-length (and helps avoid liability under the Anti-Kickback Statute)
• Independent comfort to boards that management is acting with integrity
• Helps hospitals manage risk by identifying areas of concern for monitoring purposes
REQUIRED INFORMATION

• Term sheet and/or contract
• Written summary of benefits accrued to facility
• Representations on relevant facts related to the arrangement
• Financial impact of arrangement to both parties
• Other facts and circumstances, such as:
  ▪ Physician specialty
  ▪ Supply of physicians
  ▪ Physician productivity
  ▪ Market and competitive forces
KEYS TO SUCCESS: UNDERSTANDING THE ARRANGEMENT

• Read contract/term sheet to identify:
  ▪ Core services provided
  ▪ Payment amounts associated with the services delivered
  ▪ Payment mechanism
    • Annual fixed, per shift, per hour, per unit etc.
    • Overlap or bundling of payment for multiple services? Adjustment needed?
  ▪ What are we benchmarking?
  ▪ What potential adjustments to analysis need to be contemplated?
    • Independent contractor, multiple locations, time commitment, relative burden, payor mix etc.
On-Call Coverage Case Study – Facts

• Hospital has an identified need to provide more consistent general surgery trauma coverage as its recent ER expansion has yielded more acute cases than anticipated.

• Hospital does not employ any general surgeons trained to treat trauma cases and cannot otherwise convince qualified surgeons to volunteer to provider necessary coverage.
On-Call Coverage Case Study – Facts

• Hospital believes the engagement of qualified trauma surgeons will improve patient outcomes and enhance its reputation in the community.

• Therefore, hospital agrees to pay a pool of five local general surgeons qualified in trauma surgery a fair market value rate for 24/7/365 coverage of its emergency department.
On-Call Coverage Case Study - Facts

- Hospital proposes the physicians to provide the following services:
  - Unrestricted (“beeper”) call with a phone response time of 10 minutes and on-site consultation within 30 minutes, as necessary, and a named back-up
  - Other terms include a penalty for failure to respond, a fmv re-evaluation provision, an evergreen clause, a statement of the physicians’ right to bill for services rendered while on call, etc.
## On-Call Case Study – FMV Analysis

### Facts and Circumstances Matrix

<table>
<thead>
<tr>
<th>Category</th>
<th>Applicable Facts</th>
<th>FMV Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>M.D. Supply and Demand</td>
<td>Area has limited trauma surgeons</td>
<td>↑</td>
</tr>
<tr>
<td>Frequency of Call</td>
<td>Low call volume expected in yr. 1</td>
<td>↓</td>
</tr>
<tr>
<td>Use of Backup</td>
<td>Expected to be low</td>
<td>↑</td>
</tr>
<tr>
<td>Payor Mix of Patient Seen</td>
<td>ED has poor payor mix</td>
<td>↑</td>
</tr>
<tr>
<td>Facility Trauma Designation</td>
<td>Currently applying for level two status</td>
<td>--</td>
</tr>
<tr>
<td>Depth of Call Rotation</td>
<td>1 in 5</td>
<td>--</td>
</tr>
<tr>
<td>Other Facts</td>
<td>Hospital is in a high crime urban area</td>
<td>↑</td>
</tr>
</tbody>
</table>
# On-Call Case Study – FMV Analysis

<table>
<thead>
<tr>
<th>Survey Method</th>
<th>25th</th>
<th>50th</th>
<th>75th</th>
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</thead>
<tbody>
<tr>
<td>Trauma Surgery Daily Rate</td>
<td>$575</td>
<td>$950</td>
<td>$1,200</td>
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<table>
<thead>
<tr>
<th>Market Method</th>
<th>Rate</th>
<th>Facts and Circumstances Comparison</th>
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</thead>
<tbody>
<tr>
<td>Local Market Deal A</td>
<td>$600</td>
<td>similar in scope and intensity</td>
</tr>
<tr>
<td>Local Market Deal B</td>
<td>$800</td>
<td>Subject agmt is less intense</td>
</tr>
<tr>
<td>Regional Market Deal C</td>
<td>$1,100</td>
<td>Subject agmt is less intense</td>
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</table>
On-Call Case Study – FMV Analysis

<table>
<thead>
<tr>
<th>Synthesis of Methods</th>
<th>Low</th>
<th>High</th>
</tr>
</thead>
<tbody>
<tr>
<td>Published Survey Data</td>
<td>$500</td>
<td>$1,000</td>
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<tr>
<td>Proposed Daily Rate</td>
<td>$650</td>
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</tbody>
</table>

➢ Overall Arrangement is Fair Market Value
Overview of Commercial Reasonableness
Defining factors of commercial reasonableness (CR)

- CMS
  - “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 & size & a reasonable physician of similar scope & specialty, even if there were no potential designated health services referrals”
Defining factors of commercial reasonableness (CR)

- Office of Inspector General
  - “In order to meet the threshold of commercial reasonableness, compensation arrangements with physicians should be ‘reasonable & necessary’”
COMMERCIAL REASONABLENESS METHODOLOGY

- Partner Selection
- Business Rationale
PARTNER SELECTION

- What is historical relationship between parties & the current state?
  - What is the proposed contract arrangement?
- Do services require a physician & if so, is a certain specialty needed?
- Does other training, education or experience need to be considered?
- Are any of services already covered by existing arrangements?
- For current arrangements, are services provided at appropriate scope & amount?
PARTNER SELECTION

- Is provider available for all required duties?
- Is provider willing to perform required duties?
  - Provide history of provider’s commitment to provide quality care
- What credentials are required to provide services to facility(s)?
- What qualifications does provider bring as a partner & how does this make partner capable of performing duties of arrangement?
- Do any impactful contractual restrictions exist, *e.g.*, noncompete?
BUSINESS RATIONALE

- Are services clearly outlined & defined?
- Are services necessary to buyer or required by regulations?
- What is scope & time requirements of services & are they reasonable?
- Do services further strategic purpose of buyer?
BUSINESS RATIONALE

- Have alternative arrangements with other parties been considered that may be able to deliver contemplated services?
  - Are there existing capabilities that can be used in lieu of proposed arrangement?
  - Can existing managerial efforts cover services of arrangement?
- Are services profitable, without consideration of value of referrals?
- Do services meet specific, identified community need?
- What is overall financial impact of arrangement & services provided?
<table>
<thead>
<tr>
<th></th>
<th>Fair Market Value</th>
<th>Commercial Reasonableness</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community Need</td>
<td>✔</td>
<td>✔</td>
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<tr>
<td>Supply &amp; Demand</td>
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<tr>
<td>Value for Services</td>
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<tr>
<td>Value for Services to Organization</td>
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<td>✔</td>
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<tr>
<td>Opportunity Cost</td>
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<tr>
<td>Financial Cost</td>
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<td>✔</td>
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<tr>
<td>Strategic Fit</td>
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<td></td>
</tr>
<tr>
<td>Parties (Hypothetical)</td>
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</tr>
<tr>
<td>Parties (Specific)</td>
<td></td>
<td>✔</td>
</tr>
</tbody>
</table>
REAL WORLD EXAMPLE #2

- A hospital considered paying for orthopedic spine surgery call at a rate that was well within fair market value. But it was already paying for restricted neurosurgery coverage. The neurosurgeons were fully credentialed for spine surgery. Based on commercial reasonableness requirements, the hospital shouldn’t contract with the orthopedic spine physicians at all: A reasonable entity would not pay for the same coverage twice in the absence of referrals.
Strategic Framework For approaching Fair Market Value & Commercial Reasonableness policies
ORGANIZATIONAL NEED FOR POLICIES & PROCEDURES

• Policies & procedures enhance a culture of compliance
• Internal controls & discipline around a process are needed to supplement policies
• Failure to review agreements properly puts entire organization at risk
SUGGESTED INTERNAL APPROACH

• Incorporate independent governance around physician transactions
• Adopt valuation methodology policy & procedures
• Adopt commercial reasonableness policy & procedures
SAMPLE ARRANGEMENT PROCESS

• Initiation
• Legal review
• FMV/CR analysis
• Committee approval
• Final reconciliation of all internal documentation
  ▪ Includes final terms of arrangement
• Compliance file is generated
Tactical Approach to Fair Market Value
FAIR MARKET VALUE METHODOLOGY

- Parties
- Services
- Compensation
- Quantitative Analysis
- Qualitative Analysis
- Items to Retain in FMV File
PARTIES

- Who are the parties buying & selling the services of the arrangement?
- What is the legal relationship between the parties?
- Are there other contractual arrangements that exist between the parties?
SERVICES

- What specific services will be provided?
- Are any services in the arrangement currently provided by the seller?
- What is the location(s) at which the services are provided?
- What specialty do the services fall under for reporting & oversight?
- What are the specific terms of the agreement?
COMPENSATION

- What are the terms of compensation for services provided?
- What is the expected payment level?
- What are the key assumptions informing the expected payment level?
QUANTITATIVE ANALYSIS

- What methodology was utilized for establishing FMV?
- What market data exists for services provided?
- Are there differences between market data assumptions & terms of arrangement?
- Are any services performed simultaneously & if so, what adjustments have been made to FMV analysis?
- Does FMV determination take into account value or volume of referrals?
- What is the conclusion of FMV range?
QUALITATIVE ANALYSIS

- What is demand for services & availability of providers?
- What is current community need for contemplated services?
- Is quality-related compensation a contemplated arrangement term?
- What is the payor mix & reimbursement environment?
- Will service provider provide any nonpaid services such as administrative duties?
- Is service provider an innovator in care or serving in leadership roles in applicable organizations?
- Are there any other terms of arrangement that are unique &/or may affect value of services provided?
Items to retain in FMV file

- Contract or term sheet
- Quantitative analysis
- Provider CV(s) or similar list of qualifications
- Copy of commercial reasonableness memo
Experience

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THANK YOU!
FOR MORE INFORMATION

Neil Giannini, CPA/ABV
Managing Consultant
BKD, LLP
ngiannini@bkd.com

Tammy Walsh
Director
BKD, LLP
twalsh@bkd.com