Making Gainsharing Work: Successfully Incentivizing & Managing Physician Performance

Cynthia Marcotte Stamer, Esq.
Cynthia Marcotte Stamer, P.C.
3948 Legacy Drive, 106, Box 397, Plano, Texas 75023
16633 North Dallas Parkway, Suite 600, Addison, Texas 75001
24-Hour Telephone (469) 767.8872
CStamer@Solutionslawyer.net
www.CynthiaStamer.com

©2012 Cynthia Marcotte Stamer. All rights reserved.

THE FINE PRINT

This presentation and any materials and/or comments are training and educational in nature only. They do not establish an attorney-client relationship, are not legal advice, and do not serve as a substitute for legal advice. No comment or statement in this presentation or the accompanying materials is to be construed as an admission. The presenter reserves the right to qualify or retract any of these statements at any time. Likewise, the content is not tailored to any particular situation and does not necessarily address all relevant issues or be updated to reflect the current state of law in any particular jurisdiction or circumstance as of the time of the presentation. Parties participating in the presentation or accessing of these materials are urged to engage competent legal council for consultation and representation in light of the specific facts and circumstances presented in their unique circumstance.

Circular 230 Compliance. The following disclaimer is included to ensure that we comply with U.S. Treasury Department Regulations. Any statements contained herein are not intended or written by the writer to be used, and nothing contained herein can be used by you or any other person, for the purpose of (1) avoiding penalties that may be imposed under federal tax law, or (2) promoting, marketing or recommending to another party any tax-related transaction or matter addressed herein.*

©2012 Cynthia Marcotte Stamer. All rights reserved.
Services Contract Is Legal Document That Addresses Many Matters

- Recitals
- Introduction
- Agreement
- Definitions
- Obligations and Representations of Physician/Service Provider
- Obligations and Representations Of Principle Including Pay For Performance and Other Special Performance Based Compensation, Other Required Performances
- Mutual Obligations and Operating Rules
- Amendment and Interpretation
- Term and Termination
- Post Termination Obligations
- Confidentiality and Nondisclosure
- Medical Privacy
- Restrictive Covenants
- Problem Solving/Dispute Resolution
- Remedies
- Miscellaneous and General Provisions

Services Contract Serves Many Purposes

- To clarify and document the rights, powers, obligations or other expectations between the parties
- To protect expectations of one or both of the parties
- To meet other compliance obligations under applicable statutes, laws, regulations or contracts
- To document compensation or other special compensation arrangements
- To affect the tax treatment of compensation arrangements and/or contracting entities
- To provide for indemnification and attorneys' fees
- To provide special arbitration or other procedures for resolving disputes
- Other
Primary Purpose to Define, Communicate and Document Parties Agreement of How Parties Agree to Work Together to Meet Agreed Goals

- Expectations and Desires of Parties
- Required and Prohibited Performances
- Procedures for Measuring and Evaluating Performance
- Rewards/Penalties for Noncompliance, Superior Performance
- Problem Solving
- Amendment and Termination
- Other Reassurances
- Other Protective Provisions
- Boilerplate the Lawyers Require

Many Factors Influence Contract Terms, Their Negotiation, Administration and Enforcement

- Leadership Style of Parties
- Purpose and Nature of Services
- Needs of Parties
- Attitude of Parties
- Level of Trust and Mutual Respect of Parties
- Bargaining Strength of Parties
- Who Participates In Negotiation
- Level of Involvement of Physicians, Management, Others
- Culture and Scope of Services
- Economic Situation
- Employment vs. Independent Contractor Relationship
- Quality, Performance and Other Operating Requirements
- Legal Requirements
- Market Needs and Realities
- Political Considerations
- Other
Legal Mandates Important Consideration

- Legal and Ethical Requirements Under
  - Stark, Fraud and Abuse, False Claims and Other Laws
  - Medical Staff Bylaws
  - Ethical Standards
  - Accreditation Standards and Requirements
  - Common Law
  - Regulatory Mandates
  - Reimbursement Contracts and Regulations Standards and Requirements
Legal Mandates Important Consideration

- Legal Obligations to Other Stakeholders
  - Patients
  - Other Health Care Providers
  - Employees
  - Health Plans
  - Public Stakeholders/Shareholders
  - Others

- Other

External Legal Considerations Shape Parameters of Contract Terms

Legal Requirements Define Parameters of Relationship and Influence Certain Performances

- Legal Mandates and Prohibitions
- Legal Risks
- Medical Staff Bylaws
- Licensing and Certification Requirements
- Ethical Standards
- Accreditation Standards and Requirements
- Reimbursement Contracts and Regulations
- Other

Not Substitute For Deal Itself

©2012 Cynthia Marcotte Stamer. All rights reserved.
**Attitude of Parties Shapes Contract Style and Operation**

*History Tells Story*

<table>
<thead>
<tr>
<th>PARTNERSHIP/TEAM APPROACH</th>
<th>MANAGEMENT/CONTROL APPROACH</th>
</tr>
</thead>
<tbody>
<tr>
<td>➢ Assumes parties ‘right’ motivated</td>
<td>➢ Assumes parties will not do right thing without contract</td>
</tr>
<tr>
<td>➢ Parties are partners joining together to pursue shared goal and outcome</td>
<td>➢ Power focused</td>
</tr>
<tr>
<td>➢ Collaborative based</td>
<td>➢ “Bossy” - Order based</td>
</tr>
<tr>
<td>➢ Emphasis on collaborative development and administration of processes and outcomes</td>
<td>➢ Emphasis on telling</td>
</tr>
<tr>
<td>➢ Anticipates level of shared trust and mutual respect</td>
<td>➢ Tends to arise from and perpetuate distrust</td>
</tr>
<tr>
<td>➢ Contract promotes success by defining operating rules, expectations and processes</td>
<td>➢ Often reflects concern about lack of shared goals and commitment</td>
</tr>
<tr>
<td>➢ Emphasis on incentives and rewards rather than penalties &amp; sanctions</td>
<td>➢ Deters joint problem solving and initiative</td>
</tr>
<tr>
<td>➢ Encourages joint problem solving initiative</td>
<td></td>
</tr>
</tbody>
</table>

©2012 Cynthia Marcotte Stamer. All rights reserved.

---

**Health Care Industry Management**

Control Dominant Focus For Past 20 Years

➢ Government, health plan controls, cost challenges prompted shift in emphasis from collaboration to management style

➢ Medicare Anti-Referral, Stark III, False Claims, Other Regulations

Institutionalized Distrust For Healthcare Teamwork

©2012 Cynthia Marcotte Stamer. All rights reserved.
Medicare Fraud Controls and Other System Changes
Reflect Distrust for Healthcare Teams

- Medicare Civil Monetary Penalty Prohibit Payments to Providers to Reduce or Limit Services
- Anti-kickback Statute Prohibits Health Care Providers From Receiving or Providing Direct or Indirect Compensation For Referrals
- STARK Law Prohibits Physician, Other Designated Health Care Provider From Referring a Patient to a Medical Facility in Which Provider Has a Financial Interest, Be It Ownership, Investment, or a Structured Compensation Arrangement
- False Claims Act Prohibits Health Care Providers From Billing Federal Programs For Care Resulting From Prohibited Conduct
- Limits on Funding For Care Increasingly Makes Caregivers Competitors For Healthcare $$$

Managed Care and Other Third Party Reimbursement

- Explosion of Conditions on Reimbursement
- Managed Care Contracting
  - Competition for $$$
  - Requirements For Reimbursement
  - Payers Contracts With Hospitals Require Management Controls
Other External Controls Prompting Emphasis on Controls

Explosion of Requirements Shifts Emphasis To Verifiable Controls

- OIG Compliance Plans
- State Licensing and Certification Agencies
- Reimbursement Requirements
- Joint Commission and Other Accreditation

Health Care Industry Management Growing Emphasis on Control For Past 20 Years

Over-Emphasis on Controls At Expense of Collaboration Fueled Unintended Consequences

- Contention replaces consultation
- Competition replaces collaboration
- Many Healthcare Teams Broken or Strained
- Communication and Care Suffer
- Quality, Cost, Professionalism and Morale Suffer
- Compliance Efforts Undermined By Disengagement, Defensiveness
- Self-Perpetuating Cycle Fuels More Controls
- Caregiver and Patient Satisfaction Declines
Poor communication and/or lack of collaboration among patient’s health care team contribute to medical errors and poor quality of care.

Efforts to improve health care safety and quality depend on teamwork and are jeopardized by the communication and collaboration barriers that exist between physicians and registered nurses (RNs).
Quality & Cost Implications

STUDY PHYSICIAN-NURSE DISCONNECT

- Midmorning, 23 percent of physicians could name the RN caring for their patient and 42 percent of RNs could name the physician responsible for the same patient.

- Mid-afternoon, 50 percent of physicians and RNs reported discussing the patient with each other, while over 90 percent of RNs and PCTs had discussed patient care with each other.

- Full agreement on patient priorities between the physician and RN in 17 percent of cases, partial agreement in 53 percent of cases, and no agreement in 30 percent of cases.

- Agreement between physicians and RNs was higher than the agreement between RNs and PCTs.

Evolving Health Care Environment Prompts Growing Recognition of Need to Restore/Strengthen the Care Delivery Partnership Among Caregivers
Legal, Accreditation and Other Requirements Increasingly Tie Quality, Teamwork to Reimbursement, Regulation

Teamwork Required To:
Deliver and Document Required Quality,
Secure Desired Reimbursement
Meet Compliance Obligations
Manage Liability

Healthcare Is A Team Sport

Teamwork Delivers Best Quality Care At Best Cost
Growing Recognition of Building and Supporting Health Care Team

Challenge – How To Get Physicians, Other Caregivers to Reinvest

Gainsharing and Other Pay-For-Performance Strategies Reflect Emerging Interest In “New Covenant” Relationship

Incentive and Reward Physicians for Participation
What is Gainsharing?

- Arrangement between a hospital or health plan and group of physicians where they
  - Identify areas of cost savings,
  - Devise and implement plan to achieve and measure the savings
  - Divide the savings between hospital and physicians
- Simple concept – difficult to implement and administer

Pay-For-Performance and Gainsharing Sources of Interest Include

- Extension of non-healthcare management principles to health care
- Recognize physicians, other care givers play key role in controlling cost and quality of care
- Lack of economic integration between hospitals, physicians and other caregivers deterred physician input & involvement in efforts to manage quality and cost
- Giving physicians cash payments for reduced hospital spending and promoting other quality efforts can help control costs without sacrificing quality or access to care, researchers report in a study released in May/June 2008 issue of the Journal Health Affairs
Gainsharing and Other Pay-For-Performance Initiatives

Formal Reward System Built on Three Elements

- **Philosophy of Cooperation**
  Organizational climate where high levels of trust, communication, participation and harmonious industrial relations are held by most, if not all, members

- **Service-Provider Based Involvement/Improvement System**
  Structure whereby productivity is improved or other goals achieved through service provider based improvement system where service providers develop and implement ideas related to productivity or quality improvement

- **Financial Bonus**
  Financial or other compensation is tied to measurable, quantifiable achievement of predefined quality, cost, or other performance goals

Federal Health Care Fraud Rules Continue To Present Challenges To Pay-For-Performance But Recent Developments Offer New Opportunities …
Pay-For-Performance
A Brief History of Evolving Legal Treatment

➢ "Hot topic" in the 1990s By Hospitals, Health Plans

▪ IRS Issued Favorable Rulings On Pay-for-performance Gainsharing Arrangements

▪ Limited Enforcement of Federal Health Care Fraud Rules Fueled Perception Allowable

1990s Pay-For-Performance Speed Bumps

▪ 1999 OIG Special Advisory Bulletin

  ✓ Improper payment to reduce/limit services in violation of Civil Monetary Penalty Prohibitions subject to sanctions under SSA §1128A(b)(1)-(2)

  ✓ Potentially generates prohibited remuneration under the Anti-kickback Statute, SSA § 1128B(b) of the Act if the requisite intent to induce or reward referrals of Federal health care program business present subject to sanctions under SSA under sections § § 1128(b)(7) or 1128A(a)(7))

  ✓ For designated health care providers providing designated services, prohibited compensation under STARK Law

▪ Many Private Health Plan Pay-For-Performance Practices Also Challenged or Found Prohibited
Pay-For-Performance
A Brief History of Evolving Legal Treatment

August 2005 – Present, OIG Gives Go-Ahead To Certain Pay-For-Performance Gainsharing Arrangements

OIG Special Advisory Bulletin www.oig.hhs.gov/fraud/docs/alertsandbulletins/gainsh.htm

- Beginning in February, 2005, OIG Issues Advisory Opinions Allowing Some Gainsharing Arrangements
  - Reaffirms Gainsharing Prohibited But
  - Will not impose sanctions for that particular arrangement
  - Only applies to Parties to Opinion

- At least 11 Rulings Issued Sketch Probable Parameters, But Only Recipients Can Rely

Demonstration Projects under 2005 Deficit Reduction Act
Evidence Based Medicine & Expanding Technology Initiatives
Medicare/Medicare Advantage Plans Adopting Pay-For-Performance Mechanisms

Deficit Reduction Act of 2005 § 5007

- Required Gainsharing Demonstration Projects
- Administrators Required to Report in 2008 and 2009 and Submit its Final Report No Later Than May 1, 2010
- Preliminary Reports Favorable
Themes From OIG Opinions

- Very similar fact patterns
  - Parties
    - Hospital
    - Physicians
    - Program Administrator

Recent OIG Opinions

- Gainsharing Plans
  - Elements:
    - Achieve cost savings
    - No reduction in services
    - No reduction in quality
Recent OIG Opinions

- Gainsharing Plans:
  - Four Different Types of Cost Reduction
    - ✓ Product substitution
    - ✓ Product standardization
    - ✓ Perform/use as needed
    - ✓ Open as needed

Recent OIG Opinions

- Gainsharing Plan Safeguards:
  - Clearly and separately identified cost savings measures and resulting savings
  - Credible medical support that measures will not adversely affect patient care
Gainsharing Plan Safeguards (Continued):

- Payments under the arrangement based on all procedures regardless of patient insurance coverage
- Floor established beyond which no savings would be recognized
- Cap placed on savings passing to physicians and the arrangement is limited in duration

- Disclosure of the plan to patients
- Physician groups profits were distributed on a per capita basis, so no incentive for an individual physician to generate disproportionate cost savings
- Physicians will still have available the same selection of devices
- Third-party administrator
Health Care Reform
Expanding Receptivity To Pay-For-Performance

Medicare Shared Savings Program (MSSP)

- PPS Proposed Rule FY2013 Regulations Value Based Payment Program & Hospital Readmission Program
- CMS/OIG Interim Final Rule Final Waivers In Connection With Shared Savings Program at [http://op.bna.com/hl.nsf/id/bbrk-8m1kzq/$File/ACOwaiverOct202011.pdf](http://op.bna.com/hl.nsf/id/bbrk-8m1kzq/$File/ACOwaiverOct202011.pdf) waives certain federal healthcare fraud and abuse laws for Accountable Care Organizations (ACOs) participating in the MSSP.

Health Care Reform
Expanding Receptivity To Pay-For-Performance

Medicare Shared Savings Program (MSSP) CMS/OIG Interim Final Rule Final Waivers In Connection With Shared Savings Program waives certain federal healthcare fraud and abuse laws for Accountable Care Organizations (ACOs) participating in the MSSP.
Health Care Reform
Expanding Receptivity To Pay-For-Performance

Medicare Shared Savings Program (MSSP)  CMS/OIG Interim Final Rule Final Waivers In Connection With Shared Savings Program Preamble

“sets forth waivers of certain provisions of the Physician Self-Referral Law, the Federal anti-kickback statute, the CMP law prohibiting hospital payments to physicians to reduce or limit services (the Gainsharing CMP), and the CMP law prohibiting inducements to beneficiaries (the Beneficiary Inducements CMP) as necessary to carry out the provisions of section 1899 of the Act.”

Health Care Reform
Expanding Receptivity To Pay-For-Performance

Medicare Shared Savings Program (MSSP)  CMS/OIG Interim Final Rule Final Waivers In Connection With Shared Savings Program Preamble

“We seek to waive application of these fraud and abuse laws to ACOs formed in connection with the Shared Savings Program so that the laws do not unduly impede development of beneficial ACOs, while also ensuring that ACO arrangements are not misused for fraudulent or abusive purposes that harm patients or Federal health care programs.”
Medicare Shared Savings Program (MSSP) CMS/OIG Interim Final Rule Final Waivers In Connection With Shared Savings Program Preamble

- Expands the number of waivers to 5
- Adds waiver for start-up or “pre-participation” activities by ACOs in anticipation of participation in the MSSP, a broad “participation” waiver that applies to ACO-related arrangements during the term of an ACO’s participation, and a “patient incentive” waiver to allow ACOs to offer medically-related incentives to beneficiaries under the MSSP.
- Waivers self-executing - no separate application form or submission is required for ACOs to qualify for the waivers
- Waivers available in addition to, do not limit availability of any existing exceptions or safe harbors available under Stark, Anti-Kickback, or CMP gainsharing or beneficiary inducement laws
- Information on waivers will be made available on both the CMS and OIG websites

Pre-Participation and Participation Waivers
The pre-participation and participation waivers are designed to cover a broad array of start-up arrangements that include any items, services, facilities, or goods used to create or develop an ACO. CMS Examples include:
- infrastructure creation and provision,
- information technology (such as EHR and reporting systems),
- hiring of staff,
- care coordination mechanisms,
- consulting and legal services,
- incentives to attract primary care physicians.
Pre-Participation and Participation Waivers

The waiver applies to arrangements within the ACO (among and between the ACO and ACO providers/suppliers) as well as outside the ACO with providers/suppliers involved in ACO-related activities such as coordinating or managing care for ACO participants. The waivers do not require written agreements for all of the various arrangements, but this is recommended by CMS as a best practice.

Stark, Anti-Kickback, and gainsharing laws are waived for certain “start-up arrangements” that predate an ACO’s participation in the MSSP where the following conditions are met:

- The arrangement conducted with a good faith intent to develop an MSSP-participating ACO starting in a target year;
- The parties taking diligent steps to develop the ACO within the target year;
- The ACO’s governing body has made a bona fide determination that the arrangement is “reasonably related” to the purposes of the MSSP; and
- The arrangement, diligent steps, and authorization contemporaneously documented and publicly disclosed (on its website) by the ACO.

The waiver, only available to an ACO once

- Waiver would start on the date one year prior to the anticipated application due date (the target year)
- Waiver would end on the start date of participation or the date six months after the date of denial of an application or the application due date when the ACO fails to submit an application, unless it qualifies for an extension by demonstrating to CMS a likelihood of successfully developing an ACO by the next available application date.
Health Care Reform

Medicare Shared Savings Program (MSSP) CMS/OIG Interim Final Rule Final Waivers In Connection With Shared Savings Program

Pre-Participation and Participation Waivers

- For an ACO participating in the MSSP (whether or not it had in place a pre-participation waiver), Stark, Anti-Kickback, and gainsharing laws are waived for any arrangement of an ACO provided all of the following conditions are met:
  - The ACO has an MSSP participation agreement in good standing;
  - The ACO meets the governance, leadership, and management requirements for participation in the MSSP;
  - The ACO’s governing body has made a bona fide determination that the arrangement is “reasonably related” to the purposes of the MSSP; and
  - The arrangement and authorization are contemporaneously documented and publicly disclosed (on its website) by the ACO.
- The waiver would start on the date of the participation agreement and end on the date six months following the date of expiration or voluntary termination of the agreement, unless terminated by CMS on the date of the termination notice. For ACOs that have a pre-participation waiver, it would merge with the participation waiver and no separate governing body approval is required.
- The pre-participation and participation waivers are designed to cover a broad array of start-up arrangements that include any items, services, facilities, or goods used to create or develop an ACO, such as infrastructure creation and provision, information/technology (such as EHR and reporting systems), hiring of staff, care coordination mechanisms, consulting and legal services, and incentives to attract primary care physicians. The waiver applies to arrangements within the ACO (among and between the ACO and ACO providers/suppliers) as well as outside the ACO with providers/suppliers involved in ACO-related activities such as coordinating or managing care for ACO participants. The waivers do not require written agreements for all of the various arrangements, but it is recommended by CMS as a best practice.

Waiver for Shared Savings Distributions

- Stark, Anti-Kickback, and gainsharing laws waived with respect to distributions or use of shared savings earned by an ACO where the following conditions are met:
  - The ACO has an MSSP participation agreement in good standing;
  - The shared savings are earned by the ACO pursuant to the MSSP;
  - The shared savings are earned by the ACO during the term of its participation agreement (when such shared savings are used or distributed is irrelevant);
  - The shared savings are (a) distributed to the ACO’s ACO participants, ACO providers/suppliers, or individuals or entities that were ACO participants or ACO providers/suppliers during the year the shared savings were earned by the ACO or (b) used for activities that are reasonably related to the purposes of the MSSP; and
  - Payments of shared savings distributions are not knowingly made to induce the physician to reduce or limit “medically necessary” items or services to patients under the direct care of the physician.
- “Medically necessary” will be interpreted as being consistent with the Medicare program rules and accepted standards of practice.
- Waiver is limited to distributions of shared savings only
- Waiver does not include similar performance-based payments from private commercial plans.
- ACOs qualifying for the waiver permitted to distribute or use shared savings in any manner or form within the ACO and in a greater range of manners or forms with outside parties, e.g., waiving permits “downstream” distributions of shared savings among the ACO, ACO participants, and ACO providers/suppliers.
- Distributions to outside parties, such as referring physicians, also permitted if the shared savings will be used for activities that are reasonably related to the purposes of the MSSP.
Stark Law Waiver

The Stark law waiver provides immunity under the Anti-Kickback and gainsharing laws for financial relationships among ACO participants (other than distribution of shared savings) where the following conditions are met:

- The ACO has an MSSP participation agreement in good standing;
- The financial relationship is “reasonably related” to the purposes of the MSSP; and
- The financial relationship implicates Stark and fully complies with an available Stark exception.

This waiver simplifies the regulatory analysis from proposed rule by eliminating the need to separately determine if an Anti-Kickback Statute safe harbor is met or to evaluate the arrangement under available OIG advisory opinions regarding gainsharing.

Waiver for Patient Incentives

The Anti-Kickback Statute and the CMP law provisions prohibiting inducements to beneficiaries are waived for items or services provided by an ACO to beneficiaries for free or below fair market value where the following conditions are met:

- The ACO has an MSSP participation agreement in good standing;
- There is a “reasonable connection” between the items or services and the medical care of the beneficiary;
- The items or services are in-kind (not cash) and
  - Are preventive care items or services; or
  - Advance one or more of the following clinical goals:
    - Adherence to a treatment regime.
    - Adherence to a follow-up care plan.
    - Management of a chronic disease or condition.

This waiver:

- Currently applies to all beneficiaries and not just the beneficiaries assigned to the ACO in question.
- Currently is NOT applicable to discounts offered by manufacturers or suppliers of goods or services to ACOs or ACO participants or providers/suppliers.
- CMS declined to define “preventive care” to allow additional flexibility for ACOs, e.g., CMS provides that under the “reasonable connection” standard, supplying blood pressure cuffs might be permissible, but providing beauty products or theater tickets would not be. Financial incentives such as waivers or reductions in copays or deductibles would not be eligible for this waiver.
Reasonably Related Definition Used Within Waiver Requirements

The pre-participation and participation waivers, the Stark law waiver, and the shared savings distribution waiver all require that arrangements be “reasonably related to the purposes of the Shared Savings Program.”

“Purposes of the Shared Savings Program” includes, but is not limited to, the following:

- Promoting accountability for the quality, cost and overall care for a Medicare population;
- Managing and coordinating care for Medicare fee-for-service beneficiaries through an ACO;
- Encouraging investment in infrastructure and redesigned care processes for high-quality and efficient service delivery for patients, such as appropriate reduction of costs to the Medicare program and growth of expenditures of the Medicare program;
- Evaluating health needs of the ACO’s assigned population;
- Communicating clinical knowledge and evidence-based medicine to beneficiaries; and
- Developing standards for beneficiary access and communication.

To be “reasonably related” to the MSSP’s purposes, the arrangement need only have a nexus with one such purpose. However, arrangements that have purposes similar to those listed above but that are not related to the MSSP are not “reasonably related to the purposes of the Shared Savings Program.”

Application and Scope of the Waivers is Limited

For all the waivers, a minimum qualification is an MSSP participation agreement with CMS and compliance with all ACO regulations.

Waivers unavailable to an ACO that does not participate in the MSSP.

No added protection for ACO that does not participate in the MSSP but instead participates in shared savings programs and other pay-for-performance programs only with private payors. Such ACOs must analyze financial relationships and other remunerative arrangements among ACO participants under federal healthcare fraud and abuse laws without any reliance upon the waivers.

Also watch state “Stark,” Anti-Kickback, and fee-splitting laws that could be implicated by ACOs that are not affected by the waivers.
Pay-For Performance and Gainsharing Tax Issues

- Tax Exempt Health Care Organizations Special Tax Considerations
  - IRS has issued favorable unpublished rulings
  - Exemption issues
    - Reasonable Compensation
    - Charitable Purpose
    - Form 990 Reporting
  - Intermediate Sanctions
  - Tax exempt bonds

- Physician Compensation Issues IRC §409A

IRS Gainsharing rulings:

- Addressed whether 501(c)(3) status jeopardized by the Gainsharing arrangement

- IRS concerned with three issues:
  - Whether the arrangement was a joint venture?
  - Whether the amount paid to the physicians was reasonable?
  - Whether there was an incentive to decrease care or community benefits?
IRS Gainsharing rulings (continued):

- IRS ruled favorably
- Rulings conditioned upon the Gainsharing arrangement not violating the law

Exemption issues

- Further hospital’s exempt purposes
- Violations of law
- Private inurement
- Private benefit allowable if qualitatively and quantitatively incidental
Tax Issues

- Intermediate Sanctions
  - Code Section 4958 imposes excise taxes on “Disqualified Persons” and “Organizational Managers” for excess benefit transaction
  - Issue is whether compensation is reasonable

- Exempt organization can establish the “Rebuttable Presumption of Reasonableness” relating to a compensation arrangement with a Disqualified Person
Intermediate Sanctions (continued)

What are the sanctions?

- For Disqualified Persons: 25% and 200% if not corrected of the excess benefit
- For Organizational Managers: 10% of the excess benefit

Who are Disqualified Persons?

- Any person in a position to exercise substantial influence over the affairs of the organization; Family members; 35% controlled entities

Who are Organizational Managers?

- Officers, directors, trustees or any individual having similar powers and responsibilities of such persons
Tax Issues

- Tax exempt bonds
  - Private use:
    - With some exceptions, use of bond proceeds or bond-financed facilities by other than the 501(c)(3)
    - Examples of relationships and activities giving rise to private use:
      - Use of bond proceeds in an unrelated trade or business
      - Leases
      - Certain management or service contracts
      - Certain research agreements

- Five Percent Test

---

Tax Issues

- Tax exempt bonds (continued)
  - Private use and Gainsharing:
    - Issue is raised when the physicians are not employees
    - Issue is created when an arrangement is based on a percentage of net profit
    - Rev. Proc. 97-13 lists safe harbors
Lessons From OIG/IRS Rulings

- Involvement of Counsel and Tax Advisors
- Assess and Decide Potential of Program
- Program Design and Drafting
  - Objective, Verifiable, Measurable Predetermined Approach for Determining Pay-For-Performance Compensation
  - Fair Market Value/Reasonable Compensation Documentation
  - Documented Safeguards to Prevent Incentives From Causing Abuse
  - Objective Third Party Administration
- Seek Rulings From OIG/IRS
- Implementation

Pay-For-Performance/ Gainsharing and Evidence Based Medicine
The Body Is Not A Car
Healthcare is a Team Sport

Teamwork Delivers Best Quality Care At Best Cost

Health Care Services Contract
As A Partnership Agreement

Collaborative Partnership Documented By
Jointly Negotiated Agreement That Defines Agreed To:

- Value Proposition
- Mutually Defined, Agreed To Goals and Performances
- Mutually Beneficial, Respectful of Roles For All Participants and Stakeholders
- Processes and Procedures For Working Together
- What Performances Each Party Will Perform To Meet These Goals
- Timelines For Performance
- Performance Measures
- Formula For Determining Financial Rewards, Penalties
- Mechanism For Adjustments In Response To Changing Environment
- Mechanism For Problem Solving and Dispute Resolution
- Transparent Rules of the Game On Paper and In Operation
Health Care Services Contract
As A Partnership Agreement

Key Elements For Success

Documented Mutually Understood and Agreed To:

- Realistically Achievable Performance Requirements
- Objectively Verifiable Performance Measures
- Clear, Objective Pay-For-Performance Formula
- Ties $ Rewards and Penalties To Desired Financial and Quality Performance
- Structured Within Legal Parameters

Performance Measures and Pay

- Traditional Focus On Straight $ Savings Can Trigger Undesirable De-Emphasis on Other Performances Necessary for Quality/Cost, e.g.:
  - Instruction and Mentorship
  - Department Management
  - Participation in Quality, Medical Staff, Other Activities
  - Communication and Collaborative Conduct

- Collaborate to identify and Value Relevant Non-Financial Performance Measures
- Document Reasons Valuable and Reasonability of Process for Valuation
Negotiation Sets Tone

Contract Defines Rules Of Game
Trust But Verify
Mutual Respect
Walk A Mile In Each Other’s Shoes To Find New Solutions
Listen For Needs
Look For Opportunities To Move Ahead Jointly Through Mutual Need Satisfaction
Look For Opportunities To Say Yes
When Can’t Say Yes, Look For Opportunities To Help Other Ways

Collaborative Contract Negotiation and Administration

©2012 Cynthia Marcotte Stamer. All rights reserved.
Questions & Thank You