Learning Objectives

- Regulatory reasons to comply with FMV standard
- Understanding benchmark compensation data
- Applying market data to compensation components and aggregate compensation
- Application of facts and internal documentation
Stark in a Nutshell

Stark’s “General Prohibition”

If a physician has a financial relationship with an entity,

- then the physician may not make a referral to that entity for the furnishing of designated health services (“DHS”) for which payment otherwise may be made under Medicare;
- and the entity may not bill Medicare, an individual, or another payor for the DHS performed pursuant to the prohibited referral.

...... unless the arrangement fits squarely within a Stark exception.

Threshold Compliance Statute.

- Strict liability – no intent required. Civil (non-criminal) statute.
- Triggered by “technical” violations, inadvertence and error.
- Disproportionately large penalties.
- Aggressive government enforcement efforts.
**Common Exceptions**

*Bona Fide* Employment Relationships Exception*

- Fair market value remuneration required.
- Must not be determined in a manner that takes into account the volume or value of any referrals by the referring physician.
- Agreement must be commercially reasonable “even if no referrals were made to the employer.”
- No “in writing” requirement unless requiring or directing referrals.
- Business and operational reasons that such arrangements should be in writing.
- Recent enforcement actions in what is normally considered the “safer” situation of employment.

*Not all requirements listed.*
Common Exceptions

Personal Service Arrangements Exception*

- Must be set out in writing.
- One year requirement.
  - If terminated during year one, cannot enter into the same arrangement during the remainder of such year.
- Compensation must be set in advance and be fair market value.
- Compensation must not be determined in a manner that takes into account the volume or value of any referrals, or other business generated between the parties.
- Cross reference requirement for other arrangements between the parties.
- Similar to the Stark fair market value exception.

*Not all requirements listed.
The Regulatory Climate.
- Increases in government enforcement.
- Allegations that compensation is not fair market value, not commercially reasonable, and that compensation takes into account referrals.
- Scrutiny of “Team-Based” and “Group Practice” arrangements.
- Significant financial exposure.

Recent Enforcement Actions:
- Singh v. Bradford
- Drakeford v. Tuomey
- Kunz v. Halifax
- Heesch v. Infirmary Health System

Astronomical damages: Tuomey Example
\[
\begin{align*}
21,730 \text{ claims} \times \$5,500 &= \$119,515,000 \\
\$39,313,065 \times 3 &= \$117,939,195 \\
\$237,454,195
\end{align*}
\]
Anti-Kickback and Private Inurement

**Federal Anti-Kickback Statute**
- Criminal statute
- Prohibits the exchange (or offer for exchange) of anything of value in an effort to induce (or reward) the referral of federal health care program business
- Established penalties for individuals and entities on both sides of a transaction
- Penalties include fines, imprisonment, and exclusion from federal health programs
- Civil monetary penalties may also be sought by the government
- Qui tam actions may be brought by individuals alleging violations of the AKS

**Private Inurement**
Polling Question

What type of statute is the Stark Law

A. Criminal
B. Civil
C. Both Criminal and Civil
D. None of the Above
Under Stark II, Phase II, CMS introduced the concept of a fair market value safe harbor under the Stark Law.

- Average of four surveys for emergency medicine divided by 2,000 hours
  - Surveys included:
    - Sullivan, Cotter & Associates
    - Hay Group
    - Hospital and Healthcare Compensation Services
    - Medical Group Management Association
    - ECS Watson Wyatt
    - William M. Mercer

- Safe harbor was removed in Stark II, Phase III

_The OIG likely follows a similar process in assessing the reasonableness of compensation_
Definition of Compensation

- **MGMA:** The amount reported as direct compensation in Box 5 on a W2, 1099, or K1 (for partnerships) plus all voluntary salary reductions such as 401(k), 403(b), Section 125 Tax Savings Plan, and Medical Savings Plan. The amount reported should include salary, bonus and/or incentive payments, research stipends, honoraria, and distribution of profits. Does not include the dollar value of expense reimbursements, fringe benefits paid by the medical practice such as retirement plan contributions, life and health insurance, automobile allowances, or any employer contributions to a 401(k), 403(b), or Keogh Plan.

- **AMGA:** The total annual clinical compensation of the individual physician including base and variable compensation plus all voluntary salary reductions. Examples of clinical compensation would include but not limited to: compensation paid as salary or production based compensation plans, any type of additional bonuses or incentives, clinically related medical directorships, call coverage, ancillary or midlevel supervision stipends, other. Excluded are any fringe benefits and employer payments to any type of retirement, pension, or tax deferred profit-sharing plans.

- **Sullivan Cotter & Associates:** The sum of all cash compensation paid to the physician as of January 1, 2012. These data include the following: clinical base salary, ART base salary or stipend, incentive compensation and other cash compensation. Other cash compensation may include honoraria, longevity bonuses, retention bonuses, profit-sharing, sign-on bonuses, long-term incentive payments and the like, **but does not include on-call pay or pay for extra work such as moonlighting.** All total cash compensation data have been prorated to reflect full-time work.

- **Hay Group:** Base salary plus supplemental cash (annual incentives paid over the past year).
Clinical Compensation – Guaranteed Compensation

- **Guaranteed compensation should generally be based on historical compensation**
  - Must review historical productivity levels when developing guaranteed compensation amounts
  - Must compare services provided for compensation when developing guaranteed amount
  - A number of health system base guaranteed compensation on historical clinical compensation only and pay for other services (e.g., call coverage, administrative services) separately
  - Guaranteed compensation is established under different methods for:
    - Physicians recently graduating from fellowship or residency
    - Physicians hired to develop new programs

- **Most systems will guarantee compensation for one year if the physician is already in the market and two years if recruited out of residency or relocated into the market**
  - Some systems will guarantee compensation for longer periods if developing new program or other issues warrant the need for longer guarantees
  - Most health systems will develop a productivity floor for longer term guarantees
Clinical Compensation – Productivity Based

- **Benchmark data presents aggregate compensation data**
  - Compensation per wRVU tables generally include *all types* of compensation.
  - A physician employed by a hospital and a system affiliated group may be required to provide a certain amount of call coverage without pay.

- **In light of the Stark II, Phase II language, practitioners will commonly use a weighted average of the benchmark surveys to determine appropriate levels of compensation and productivity**
  - This method allows for the development of a more robust sample size when assessing the reasonableness of compensation and also reduce the reliance on outliers at the upper and lower tiers.

- **Productivity at the 75th percentile benchmark generally does not equate to compensation at 75th percentile compensation per wRVU benchmark**
Polling Question

What type of compensation might be included in a compensation per wRVU calculation as presented in the benchmark surveys?

A. Clinical services
B. Call coverage
C. Medical directorship
D. All of the above
# Using Benchmark Surveys

<table>
<thead>
<tr>
<th>Specialty: General Cardiology</th>
<th>Compensation per wRVU</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>25th %ile = $46.30</td>
</tr>
<tr>
<td>wRVUs</td>
<td></td>
</tr>
<tr>
<td>25th %ile = 4,710</td>
<td>$218,073</td>
</tr>
<tr>
<td>50th %ile = 6,634</td>
<td>307,154</td>
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<tr>
<td>75th %ile = 9,078</td>
<td>420,311</td>
</tr>
<tr>
<td>90th %ile = 12,092</td>
<td>559,860</td>
</tr>
</tbody>
</table>
Analyzing Components of Compensation

- **Clinical Compensation**
  - A correlation should exist between levels of productivity and compensation
  - Other factors
    - Physician need / patient demand
    - Location of market (e.g., rural)

- **Call Coverage**
  - Burden factors
  - Professional collections
  - Excess levels versus normal levels
  - Employed versus independent contractor

- **Medical Directorship and Other Administrative Compensation**
  - Typically paid on an hourly basis for time actually performed (US v. Campbell)
  - Excess levels versus normal levels
  - Documenting need (SCCI Hospital Houston case – numerous medical directors)
  - Midlevel supervision
## Example Compensation Calculation

<table>
<thead>
<tr>
<th>Compensation Type</th>
<th>Amount per Statistic</th>
<th>Hours per Year</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guarantee</td>
<td>$300,000</td>
<td>1,840</td>
<td>$300,000</td>
</tr>
<tr>
<td>Productivity Bonus (2,500 wRVUs)</td>
<td>$60</td>
<td></td>
<td>150,000</td>
</tr>
<tr>
<td>Call Coverage</td>
<td>$800</td>
<td>60</td>
<td>48,000</td>
</tr>
<tr>
<td>Call Coverage</td>
<td>$600</td>
<td>40</td>
<td>24,000</td>
</tr>
<tr>
<td>Medical Directorship</td>
<td>$150</td>
<td>240</td>
<td>36,000</td>
</tr>
<tr>
<td>CMIO</td>
<td>$150</td>
<td>480</td>
<td>72,000</td>
</tr>
<tr>
<td>Clinical Co-Management</td>
<td>?</td>
<td>?</td>
<td>50,000</td>
</tr>
<tr>
<td>Academic</td>
<td>?</td>
<td>?</td>
<td>25,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>2,660</strong></td>
<td></td>
<td><strong>$705,000</strong></td>
</tr>
</tbody>
</table>
MGMA Physician Pay to Production Plotter
## Example Compensation Calculation

<table>
<thead>
<tr>
<th>Compensation Type</th>
<th>Amount per Statistic</th>
<th>Hours per Year</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guarantee</td>
<td>$400,000</td>
<td>1,840</td>
<td>$400,000</td>
</tr>
<tr>
<td>Productivity Bonus (2,500 wRVUs)</td>
<td>$75</td>
<td></td>
<td>187,500</td>
</tr>
<tr>
<td>Call Coverage</td>
<td>$1,200</td>
<td>60</td>
<td>72,000</td>
</tr>
<tr>
<td>Call Coverage</td>
<td>$900</td>
<td>40</td>
<td>36,000</td>
</tr>
<tr>
<td>Medical Directorship</td>
<td>$225</td>
<td>240</td>
<td>54,000</td>
</tr>
<tr>
<td>CMIO</td>
<td>$300</td>
<td>480</td>
<td>144,000</td>
</tr>
<tr>
<td>Clinical Co-Management</td>
<td>?</td>
<td></td>
<td>$50,000</td>
</tr>
<tr>
<td>Academic</td>
<td>?</td>
<td></td>
<td>$25,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>2,660</strong></td>
<td><strong>$868,500</strong></td>
</tr>
</tbody>
</table>
MGMA Physician Pay to Production Plotter

Cardiology: Noninvasive Physician Compensation to Work RVUs
All Physicians Selected / All Work RVUs

Regression Line: Y = 36,411 + 0.262,301 * X  R Squared = 0.33
Median Work RVUs = 6.818  Median Compensation = $483,401

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Commercial Reasonableness

- Increased awareness of commercial reasonableness standard
- Broad scope - review of entire arrangement (not just dollars exchanged)
- Factors in addition to FMV payments

Checklist – Altegra’s key matters for consideration

- Qualitative
  - E.g., Need for services, new technology/service line
- Quantitative
  - E.g., Profitability of services, time requirements to perform services
- Administrative
  - E.g., Appropriate controls/monitoring, documentation of file, sufficient independence

- If an arrangement is not commercially reasonable, assessing FMV becomes a moot point
Polling Question

Which of the following is a qualitative factor for commercial reasonableness?

A. Profitability of the services
B. Appropriate controls in place
C. New technology / services
D. All of the above
The Physician Compensation Work File

- Documentation of need

- When to get an outside valuation?
  - Level of proposed compensation
  - Components / new service
  - Commercial reasonableness is an issue

- What needs to go in the file?
  - Compensation benchmarks
    - Basis for assessing compensation paid versus benchmarks
  - Commercial reasonableness documentation
  - Process for periodic review
  - Contract and board approval as applicable
  - Executed agreement in writing
    - Duties and controls
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