



# Provider Compensation

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# Recent Cases

- *Tri-City Medical Center (1/15/16)*
  - \$3.2 million settlement based on physician arrangements that did not comply with Stark.
- *Adventist Health System (9/21/15)*
  - \$115 million settlement based on compensation above FMV and that took into consideration tests and procedures ordered by physicians.
- *Tuomey Healthcare System (10/16/15)*
  - \$74 million settlement based on long term, part-time employment contracts that exceeded FMV and required referrals.

# Recent Cases

- *North Broward Hospital (9/15/15)*
  - \$69.5 million settlement based on compensation above FMV and formulas that allegedly took into consideration referrals.
- *Columbus Regional Healthcare System (9/4/15)*
  - \$25 million settlement based on excessive salary and directorships to referring physicians.
- *Citizens Medical Center (4/21/15)*
  - \$21.75 million based on excessive compensation to cardiologists and compensation formulas that considered cardiology referrals.

# Recent Cases

- *Mercy Health (8/13/15)*
  - \$5.5 million settlement based on bonus structure that took into account referrals.
- *Halifax Hospital Medical Center (3/11/14)*
  - \$85 million settlement based on compensation above FMV and bonus based on drugs ordered by physicians.
- *Hebrew Homes Health Network (6/2/15)*
  - \$17 million settlement based on payment for sham medical directorships.





DEPARTMENT OF HEALTH AND HUMAN SERVICES

## OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



### **Fraud Alert: Physician Compensation Arrangements May Result in Significant Liability**

June 9, 2015

Physicians who enter into compensation arrangements such as medical directorships must ensure that those arrangements reflect fair market value for bona fide services the physicians actually provide. Although many compensation arrangements are legitimate, a compensation arrangement may violate the anti-kickback statute if even one purpose of the arrangement is to compensate a physician for his or her past or future referrals of Federal health care program business. OIG encourages physicians to carefully consider the terms and conditions of medical directorships and other compensation arrangements before entering into them.

OIG recently reached settlements with 12 individual physicians who entered into questionable medical directorship and office staff arrangements. OIG alleged that the compensation paid to these physicians under the medical directorship arrangements constituted improper remuneration under the anti-kickback statute for a number of reasons, including that the payments took into account the physicians' volume or value of referrals and did not reflect fair market value for the services to be performed, and because the physicians did not actually provide the services called for under the agreements. OIG also alleged that some of the 12 physicians had entered into arrangements under which an affiliated health care entity paid the salaries of the physicians'

# The Yates Memo



- **The Government will hold individuals accountable who are found to be the responsible parties for corporate misconduct.** (Sally Yates Memo, 9/15)





# The Yates Memo – 6 Key Factors

1



Companies will have to turn over information on involved individuals in order to get cooperation credit.

2



All investigations—both criminal and civil—will start with a focus on individual actors within the company.

3



Criminal and civil attorneys will work in lockstep on corporate cases, sharing information freely.

4



Line prosecutors need written approval from a senior DOJ attorney before offering protection to individuals.

5



Individual actions have to be resolved (or have a resolution plan) before corporate actions can be resolved.

6



Civil actions will be pursued against culpable individuals, even if they can't pay a substantial fine.

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# Overview

## Relevant statutes

- Stark
- Anti-Kickback
- Civil Monetary Penalties Law
- Tax-exempt status
- State laws

## Application

- Employment
- Independent Contractors
  - Professional services
  - Medical directors
  - Call coverage
- Group Practices
- Recruitment
- Methodologies
  - Salary or hourly
  - Productivity
  - Value-based



# Preliminaries

- This program provides an overview of relevant regulatory issues affecting provider compensation.
  - Additional elements or requirements may apply.
- Application depends on the facts.
  - Parties.
  - Payers.
  - Nature of relationship.
  - Services for which compensation paid.
- Read regulations and/or consult with qualified expert when applying the law to facts.



# Preliminaries

- Written materials.
  - .ppt slides.
  - **OIG Fraud Alert: *Physician Compensation Arrangements May Result in Significant Liability* (6/9/15)**
  - **Stark Rules for Compensation Exceptions, 69 FR 16067**
  - **Client Alert, *Stark Requirements for Physician Contracts***
  - **Client Alert, *Physician Contract Checklist***
- Presentation will be recorded and available for download at [www.hhhealthlawblog.com](http://www.hhhealthlawblog.com).
- If you have questions, please submit them using chat line or e-mail me at [kcstanger@hollandhart.com](mailto:kcstanger@hollandhart.com).



# Applicable Laws





# Applicable Laws

- **Ethics in Patient Referrals Act (“Stark”)**
- **Anti-Kickback Statute**
- **Civil Monetary Penalties Law**
- **IRS tax exempt rules for 501(c)(3)’s**
- **State Laws**
  - **Anti-Kickback Statute**
  - **Mini-Stark Laws**
  - **Fee Splitting**
  - **Other**

Apply if refer items/service payable by govt programs

May or may not be limited to govt programs

# Ethics in Patient Referrals Act (“Stark”)

- If a physician (or a member of the physician’s family) has a financial relationship with an entity:
  - Physician cannot make referrals to that entity for certain designated health services (“DHS”) payable by Medicare.
  - Entity cannot submit a bill for payment for DHS rendered pursuant to a prohibited referral.

unless transaction is structured to fit within a regulatory exception (“safe harbor”).
- Violation may result in:
  - Repayment of amounts from Medicare/Medicaid
  - Civil fines of \$15,000 per service
  - False Claims Act liability

(42 USC 1395nn(a), (f); 42 CFR 411.353)

# Anti-Kickback Statute

- **Cannot knowingly and willfully offer, pay, solicit or receive remuneration to induce referrals for items or services covered by government program unless transaction fits within a regulatory safe harbor.**
- **Violations may result in:**
  - **Criminal penalties of 5 years in prison and \$25,000 fine**
  - **Civil penalties of \$50,000 per violation**
  - **False Claims Act liability**

(42 USC 1320a-7b(b))

- **“One purpose test”:** Anti-Kickback Statute applies if one purpose of the remuneration is to induce referrals even if there are other legitimate purposes. (*U.S. v. Greber*, 760 F.2d 68 (3d Cir. 1985))

# Civil Monetary Penalties Law

- **Hospital or CAH cannot knowingly make a payment, directly or indirectly, to a physician as an inducement to reduce or limit services provided to Medicare or Medicaid beneficiaries who are under the direct care of the physician.**
- **Violations may result in:**
  - **Civil penalties of \$2000/patient**
  - **Stark liability**
  - **Anti-Kickback liability**
  - **False Claims Act liability**

(42 USC 1320a-7a(b)(1); 42 CFR 1003.102)

# 501(c)(3) tax exempt status:

## Private inurement

- To qualify for tax exemption, **no part of an organization's net earnings shall inure in whole or part to the benefit of private individuals.**
  - Applies to “insiders”, i.e., those with power exercise control or influence over the organization.
  - May extend to physicians employed by organization.
- Penalties
  - Loss of tax exempt status
  - Intermediate sanctions



# 501(c)(3) tax exempt status: Intermediate sanctions

- “Disqualified persons” are subject to penalties if they are paid excessive economic benefits:
  - Return of the excess benefit.
  - 25% of the excess benefit.
  - 200% of the excess benefit if not corrected within time.
- “Disqualified persons = those who are in a position to exercise substantial influence over organization, including physicians who exert influence or control due to position.
- “Excess benefit occurs when the value of the benefit provided by the organization exceeds the value of the services received. Fair market value is the benchmark used to determine value.”

(IRS Health Care Provider Reference Guide at 6 (2004))

# **501(c)(3) tax exempt status: Intermediate sanctions**

- **Managers who participate in excess benefit transaction may also be subject to penalties.**
  - **10% of the excess benefit**
  - **\$10,000 per transaction**
- **Taxpayer generally has the burden of establishing no “excess benefit transaction”, *i.e.*, fair market value.**

# **501(c)(3) tax exempt status: Intermediate sanctions**

- **Rebuttable presumption of FMV if—**
  - **Disinterested board or committee reviews transaction before it is finalized to evaluate FMV.**
  - **Review based on comparable data typically generated by outside party, e.g., valuation consultant.**
  - **Board bases determination on the comparable data.**
  - **Decisions documented in minutes, including rationale that supports a value higher than the consultant may have generated.**

# Don't forget State laws!

- Anti-Kickback Statutes
- Mini-Stark Laws
- Fee-Splitting Statutes
- Others?



# Applying the Laws





# Employment

## Stark (Physicians)

- Compensation must be:
  - Consistent with fair market value (“FMV”) of services.
  - Does not take into account the volume or value of referrals for DHS
    - Does not apply to services personally performed by referring physician.
  - Commercially reasonable even if no referrals made.

(42 CFR 411.357(c))

## Anti-Kickback

- Compensation paid to bona fide employees for furnishing items or services payable by Medicare/Medicaid.  
(42 CFR 1001.952(i))
- Safe harbor may not apply to excess payments for referrals instead of “furnishing items or services”. (OIG Letter dated 12/22/92 fn.2)

# Independent Contractors

- Professional services agreements
- Call coverage agreements
- Medical directorships
- Medical staff leadership
- Provider supervision
- Management services
- Administrative services
- Other situations in which entity contracts with or pays referring provider for services

# Independent Contractors

## Stark (Physicians)

- Writing specifies compensation.
- Compensation formula is:
  - Set in advance.
  - Consistent with FMV.
  - Does not take into account the volume or value of services or other business generated by the physician.
- Arrangement is commercially reasonable and furthers legitimate business purpose.
- Compensation may not be changed within 1 year.

(42 CFR 411.357(d) or (l))

## Anti-Kickback

- Writing signed by parties.
- Aggregate compensation is:
  - Set in advance.
  - Consistent with FMV.
  - Does not take into account the volume or value of referrals for federal program business.
- Aggregate services do not exceed reasonably necessary to accomplish commercially reasonable business purpose.

(42 CFR 1001.952(d))

# Set in Advance

**Stark**: Compensation is considered “set in advance” if the aggregate compensation, time-based or per-unit of service-based amount, or specific formula for calculating compensation is:

- Set out in writing before the furnishing of the items or services for which the compensation is to be paid;
- Set forth in sufficient detail so that it can be objectively verified; and
- Formula not be changed or modified during the course of the arrangement in any manner that takes into account the volume or value of referrals or other business generated by the referring physician.

(42 CFR 411.354(d)(1))

# Fair Market Value

- “[E]nsure that arrangements reflect fair market value for *bona fide* services the physicians actually provide.” (OIG, Fraud Alert: Physician Compensation Arrangements May Result in Significant Liability (6/9/15))
- FMV standards differ:
  - IRS: agreed value of transaction between willing and informed buyer and seller.
  - Stark and AKS: “FMV means ... 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....” (42 CFR 411.351)



# Fair Market Value



Fair Market Value

- Fair market value is a range.
- Depends on individual circumstances.
- May use any commercially reasonable method to establish FMV, e.g., FMV analysis or published compensation surveys.
  - Be consistent.
  - Address specifics of your situation.
  - Exclude comparables in referral relationship.
- Safer if stay around 50% of published surveys for comparable circumstances, but no guarantees.

# Fair Market Value

## Factors may include:

- Comparable compensation for similarly situated providers in region (e.g., MGMA, Merritt Hawkins, etc.)
- Provider's compensation before becoming employed/contracted
- Services actually provided by provider, including additional services
- Provider's specialty
- Provider's experience
- Provider's past and anticipated personal productivity (not referrals)
- Past attempts to recruit provider to community
- Market demands
- Community need
- Other?

# Fair Market Value

- Evaluate total compensation, including:
  - Salary
  - Bonuses
  - Benefits
  - Pension
  - Deferred compensation
  - Insurance
  - Other
- Ensure compensation correlates to services performed
- Monitor performance over term of contract

# Fair Market Value

- **“While internally generated surveys can be appropriate as a method of establishing FMV in some circumstances, due to their susceptibility to manipulation and absent independent verification, such surveys do not have strong evidentiary value and, therefore, may be subject to more intensive scrutiny than an independent survey.” (66 FR 945)**

# Fair Market Value

## Independent valuers

- Not required, but may be helpful
- Helps obtain “rebuttable presumption” under IRS intermediate sanctions.
- Consider for:
  - Riskier transaction (e.g., compensation > 75% of surveys)
  - Physician has existing referral stream
  - Acquire physician practice or assets
- Cautions:
  - Ensure valuator understands Stark and AKS standards
  - Be careful what you ask for
  - No guarantee of protection


# Commercially Reasonable

- “Commercially reasonable” means “that an arrangement appears to be a sensible, prudent business agreement, from the perspective of the parties involved, even in the absence of any potential referrals.” (63 FR 1700; *see also* 69 FR 16093)
- Arrangements that lose money are suspect.
  - See recent cases.
- May be able to justify losses if, e.g.,
  - Payer mix may limit revenue.
  - High proportion of uncompensated care.
  - Services or specialty needed in community even though insufficient population to make service profitable.
  - Newly recruited physician startup time.
  - Other?

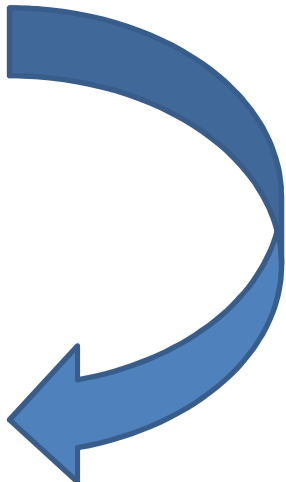


# Methodologies

- Set salary
- Time-based
  - Per hour, shift, day, or month
- Productivity-based
  - wRVUs
  - Net charges
  - Net collections
  - Net income
- Value-based



Many/most entities have moved to production-based compensation to avoid losses.



Many entities will need to move toward value-based compensation to align with changing payer arrangements.

# Productivity

**Stark**: may pay physicians based on services they personally perform. (42 CFR 411.352 and 411.357(d))

- No “referral” if physician performs services him/herself.
- “[A] service is not personally performed or provided by the referring physician if it is performed or provided by any other person, including but not limited to the referring physician’s employees, independent contractors, or group practice members.” (42 CFR 411.352, definition of “referral”; *see also* 66 FR 871-72, 69 FR 16063, 72 FR 51019)

# Productivity

- Pay per physician's personally performed services:
  - Work-related Relative Value Units (“wRVUs”)
    - $wRVUs \times \text{conversion factor} = \text{compensation}$ .
    - May utilize tiered conversion factor to incentivize production.
    - Ensure wRVUs are limited to physician's services, and are adjusted for “incident to” services, modifiers, denials, etc.
  - Percentage of billings, collections, net income.
  - Per physician's patient encounters.
  - Per fee schedule for patient's services.
- Often pay guaranteed base.
- May want to include hard or soft cap to avoid exceeding FMV.

# Productivity

- Generally may not pay provider:
  - Share of profits
  - Share of cost savings
  - Share of ancillary services
  - Share of services performed by others
  - Share of ancillary services ordered by provider
  - Share of “incident to” services billable to physician
- Limited exceptions:
  - Group practices
  - Accountable care organizations

In *Halifax*, oncologists shared in bonus pool funded by operating margin of program. Court held that compensation formula took into account referrals.

# Value-Based Compensation

- The future of provider compensation...
- “Nothing in [Stark] bars payments based on quality measures, as long as the overall compensation is fair market value and not based directly or indirectly on the volume or value of DHS referrals, and the other conditions of the exception are satisfied. For example, nothing in [Stark] would prohibit payments based on achieving certain benchmarks related to the provision of appropriate preventative health care services or patient satisfaction.”  
(69 FR 16088)

# Value-Based Compensation

- Patient management compensation
- 5%-20% of compensation based on achieving quality metrics, e.g.,
  - Clinical quality/patient safety/outcomes (e.g., patients with diabetes achieved certain standards)
  - Patient satisfaction
  - Access to care
  - Efficiency
  - Use of health IT
  - Citizenship (e.g., participation in committees, meetings, etc.)
- \* Beware “take back” or “penalty” provisions.
  - May violate state wage laws.
  - May be viewed as negative by physicians

May use existing metrics, e.g.,

- Healthcare Effectiveness Data and Information Set (HEDIS)
- Physician Quality Reporting System (PQRS)

# Value-Based Compensation

- **Beware:**
  - Profit-sharing arrangements which incentivize referrals.
  - “Gainsharing” arrangements which incentivize providers to reduce services. *(See OIG, Special Advisory Bulletin: Gainsharing Arrangements and CMPs for Hospital Payments to Physicians to Reduce or Limit Services to Beneficiaries (7/99)*
- **Stark and AKS waivers for ACOs participating in the Medicare Shared Savings Program (“MSSP”).** (80 FR 66726)



# Stacking Compensation

- Beware stacking compensation:

Base salary  
+ Production bonus  
+ Quality bonus  
+ Call coverage  
+ Medical directorship  
+ Midlevel supervision  
+ Resident supervision  
Total compensation

Cumulative compensation may exceed FMV, especially when provider is paid for separate services performed at same time, or cumulative time exceeds reasonably available hours (e.g., physician who is paid for 40 hours of clinical services should only receive additional compensation for services in excess of 40 hours).

- To mitigate, ensure that separate compensation is for separate services and distinct time requirements.

# Carve Out Medicare/Medicaid

- To circumvent Stark and/or AKS, sometimes entities will carve out Medicare/Medicaid from referral-based compensation.
- **OIG has cautioned against such “carve out” programs.**
  - If you pay for non-Medicare/Medicaid referrals, you are likely to receive Medicare/Medicaid referrals, also.
  - Thus, “one purpose” of the payment may be to induce Medicare/Medicaid referrals.

(OIG Adv. Op. 12-06)

# Paying for Supervision of Others

- May pay providers for supervision of midlevels “as long as the compensation is fair market value for actual time dedicated to supervision services and is not determined in any manner that takes into account, directly or indirectly, the volume or value of DHS referrals generated by the physician”, e.g.,
  - Per hour or other unit of time
  - Flat fee based on number of midlevels.

(69 FR 16088)
- Beware paying percentage of the supervised provider’s receivables, especially when they are affected by referrals from the supervising provider.

# Income Guarantee

- **Structure:** if provider's actual or net revenue fails to meet set amount, entity will pay the difference.
- **Potential problems:**
  - Aggregate compensation not set in advance as necessary to satisfy AKS safe harbor.
  - Compensation may be more or less than FMV.
  - Arrangement may not be commercially reasonable.
- **May be appropriate if build in protections.**
  - Minimum/maximum compensation to stay within FMV
  - No risk of program abuse.

# Medical Directors

- Ensure payments satisfy applicable safe harbor, e.g.,
  - Written arrangement, if independent contractor
  - Fair market value
  - Commercially reasonable
- Common payment methods:
  - Salary, hourly or monthly
  - Other?
- Document:
  - Services performed
  - Time that services performed, if relevant

# Call Coverage

- **OIG has approved paying for call coverage if, e.g.,**
  - **Lack of specialty services otherwise available, and/or**
  - **Physicians won't take call w/ out pay because of practice demands, time commitment, or uncompensated care.**

*(See, e.g., OIG Adv. Op. 12-15)*
- **Ensure payments satisfy applicable safe harbor, e.g.,**
  - **Written arrangement, if independent contractor**
  - **Fair market value**
  - **Commercially reasonable**
- **Document need for call coverage and services provided.**

# Call Coverage

## Beware:

- “Lost opportunity” or similar payments that do not reflect *bona fide* lost income.
- Payment structures that compensate providers even though no identifiable services provided.
- Aggregate on-call payments that are disproportionately high compared to provider’s regular practice income.
- Payment structures that allow provider to receive duplicate payments from other payers, patients, etc., for same services.
  - Consider effect on cost report.
- Payments in response to threats that provider will refuse to continue to use hospital unless payments are provided.

(OIG Adv. Op. 12-15)



# Call Coverage

## Common methods

- Daily or hourly rate, with or without right to bill.
- Paying lower hourly/daily, but higher rate if provider is called in.
- Paying for excess call over certain number of shifts per month.
- Paying for professional fees for uninsured patients, perhaps based on Medicare rates.
- Income guarantee for services performed while on call coverage.
- Paying physician's malpractice insurance for call.
- Joint arrangement with other hospitals to share call coverage and payment for same.
  - Consider antitrust implications.
- Deferred compensation plan.

# Call Coverage

**Factors in determining call compensation might include, e.g.,**

- **Compensation associated with specialty.**
- **Frequency of need to serve on call panel.**
- **Frequency of calls when on panel.**
- **Acuity of care when called in.**
- **Volume of uninsured or underinsured patients, and/or payer mix.**
- **Bylaws requirements to provide level of call without compensation.**
- **Whether call is concurrent at other locations.**
- **Whether physician is allowed to perform potentially conflicting services while on call.**
- **Whether physician is able to respond when called.**
- **Others?**

# Requiring Referrals

**Stark**: may condition compensation on referrals to provider if:

- *Bona fide* employment or personal services arrangement;
- Compensation is set in advance for term of arrangement;
- Referral requirement is set out in writing and signed by parties;
- Referral requirement does not apply if:
  - Patient prefers another provider,
  - Insurer determines provider, or
  - Physician believes referral is not in patient's best medical interest;
- Required referrals relate solely to physician's services covered by scope of employment or personal services arrangement; and
- Referral requirement reasonably necessary to effectuate legitimate business purpose of the compensation arrangement.

(42 CFR 411.354(d)(4))

# Compensation Terms in Contract



# Compensation Terms in Contract

- Base salary, wages or compensation.
- Productivity bonus or incentive compensation.
  - Basis or formula, e.g.,
    - Net income, collections, billings, etc.
    - wRVUs
    - Quality indicators or benchmarks.
  - Trigger for bonus or productivity component.
  - Cap on maximum income.
  - Confirm whether provider must remain employed through bonus period to be eligible for bonus.
  - Confirm whether production-based compensation payable post termination.

# Compensation Terms in Contract

*Depending on employee v. contractor:*

- Additional pay for call, holiday, weekend, etc.
- Exempt employee for purposes of FLSA, if applicable.
- Benefits, e.g., insurance, retirement, PTO, CME, license fees, phone, etc.
- Deferred compensation (check with tax advisor).
- Signing bonus, relocation, student loan repayment, etc.
- Requirement to remain employed for period of time or repay signing bonus, relocation, licensure, CME, etc.
- Reimbursement for business expenses.



# Compensation Terms in Contract

- Requirement for physicians to make referrals per 42 CFR 411.354(d)(4), if applicable.
- Adjustment or termination if compensation does not reflect FMV.
- No modification of compensation within first year.
- Assignment of right to bill and retain collections.

# Group Practice Compensation



# Group Practice Compensation

- Stark applies to referrals within physician group; thus, must structure group compensation to comply with Stark.
  - Owners:
    - “Group practice” exceptions
      - Physician services
      - In-office ancillary services
    - Rural provider exception
    - Whole hospital exception
  - Non-owners:
    - Group practice exceptions
    - Employment or personal services exceptions

# Group Practice Compensation

To qualify for Stark's "group practice" safe harbors, group must qualify as a "group practice", including:

- Overhead expenses and income distributed per method that is determined before receipt of payment for services.
- Physician's compensation may not be based on the volume or value of the physician's referrals for DHS, except for special rules re:
  - Productivity bonuses
  - Profit shares

(42 CFR 411.352)

# Group Practice Compensation

## Productivity bonuses

- May pay group physician based on:
  - Services physician personally performed, and/or
  - “Incident to” services.
- Productivity formula deemed not to be based on referrals if:
  - Bonus is based on total patient encounters or RVUs.
  - Bonus based on allocation of compensation attributable to services that are not DHS payable by fed program or private payer.
  - Revenues from DHS < 5% of group’s total revenues, and allocated portion of DHS revenues < 5% of physician’s total compensation.

(42 CFR 411.352(i))

# Group Practice Compensation

## Share of Profits

- May pay group physician based on share of overall profits from DHS of group or component of at least 5 physicians, provided that share is not determined in a manner that directly relates to volume or value of DHS by the physician.
- Share of profits deemed not to be based on referrals if:
  - Profits divided per capita.
  - Revenues from DHS distributed based on distribution of revenues from services that are not DHS payable by fed program or private payer.
  - Revenues from DHS < 5% of group's total revenues, and allocated portion of DHS revenues < 5% of physician's total compensation.

(42 CFR 411.352(i))

# Ownership in Rural Provider

## Stark: Rural Provider Exception

- Physician-owned entity furnishes DHS in a “rural area”, i.e., outside a metropolitan statistical area (“MSA”).
- Entity furnishes at least 75% of the DHS that it furnishes to residents of a rural area.
- If entity is a hospital in which physicians or family members have ownership or investment interest, hospital must satisfy additional requirements applicable to physician-owned hospitals in 42 CFR 411.362.

(42 CFR 411.356(c)(1))



# Ownership in Hospital (e.g., Specialty Hospital)

## Stark: Whole Hospital Exception

- Physician or family member has ownership or investment in the whole hospital, not a department or distinct part.
- Status established as of 12/31/10.
  - Physician had interests as of 12/31/10.
  - No addition of operating rooms, procedure rooms, or beds unless exception granted through reg process.
  - No increase in the percentage of physician ownership.
- Compensation does not depend on referrals.
- Returns based on investment, not referrals.
- Cannot loan money for investment.
- Investment offered on same terms to non-physicians.

(42 CFR 411.356(c)(3) and .362)

# Ownership in Hospital (cont.)

- **Must disclose conflict of interest.**
  - Hospital must submit annual report regarding physician investors.
  - Physicians must provide written notice of ownership interest to patients the physician refers to the hospital.
  - Hospital must disclose on website and in advertising that hospital is owned by physicians.
- **If no physician present 24/7, must provide written notice to patient and obtain acknowledgement.**
- **Must have ability to assess, provide initial treatment, and transfer all patients.**

(42 CFR 411.356(c)(3) and .362)

# Recruiting Providers



# Recruiting Providers

- **May compensate recruited provider under:**
    - Employee safe harbor
    - Independent contractor safe harbor
    - Group practice safe harbor
    - Recruitment safe harbor
      - Allows hospital or FQHC to pay physician or midlevel to relocate to service area.
      - Compensation not limited to FMV.
      - Subject to many conditions.
- Limited to FMV

# Recruiting Physicians

## Stark (Physicians)

- Remuneration limited to amount necessary to recruit.
- Remuneration does not take into account volume or value of referrals or other business generated.
- If physician joins group, income guarantee limited to additional incremental expenses.

(42 CFR 411.357(e))

- Don't change compensation after physician relocates.

(CMS Adv. Op. 2007-01)

## Anti-Kickback

- Benefits provided for no more than 3 years.
- Benefits do not vary based on referrals or other business generated.
- No referral requirement.

(42 CFR 1001.952(n))

# Recruiting Midlevels

## Stark

- Remuneration to physician to recruit midlevel for primary care or mental health services.
- Not conditioned on referrals by midlevel or physician practice.
- Midlevel has compensation arrangement with physician practice.
- Compensation, signing bonus, and benefits paid by physician do not exceed FMV.
- Remuneration by hospital < 50% of compensation, signing bonus, and benefits paid by physician to midlevel during first 2 years.
- Remuneration by hospital does not take into account referrals or other business generated.
- Remuneration by hospital does not exceed 2 years.

(42 CFR 411.357(x))

# Action Items





# Action Items

- **Identify compensation relationships with referring providers or their family members.**
  - Employment.
  - Services contracts (e.g., professional services agreements, medical directorships, call coverage, administrative services, etc.).
  - Group compensation structures.
  - Recruitment incentives.
  - **Other less obvious arrangements:**
    - Subsidies or loans.
    - Joint ventures or partnerships.
    - Professional courtesies.
    - Free or discounted items or services (e.g., use of space, equipment, personnel or resources; professional courtesies; insurance; gifts; etc.).

# Action Items

- Review relationships for compliance with statute or exception, e.g.,
  - No intent to induce referrals for government program business.
  - Written contract that is current and signed by parties.
  - Fair market value.
  - Compensation not based on volume or value of referrals.
  - Commercially reasonable and serves legitimate business purpose.
  - Compliance with terms of contract.
    - Parties providing required services.
    - Documentation confirming that services provided.

# Action Items

- **Implement method to track and monitor relationships with referring providers for compliance.**
  - Central repository for contracts or deals.
  - Process for confirming compliance before payment.
  - Require review and approval by compliance officer, attorney or other qualified individual.
    - Contracts.
    - Joint transactions with referral sources.
    - Benefits or perks to referral sources.
    - Marketing or advertising.
  - 501(c)(3): provide independent review per IRS standards.

# Action Items

- **Ensure your compliance policies address fraud and abuse laws.**
- **Train key personnel regarding compliance.**
  - Administration.
  - Compliance officers and committees.
  - Human resources.
  - Physician relations and medical staff officers.
  - Governing board members.
  - Accounts payable.
- **Document training.**

# If you think you have a problem

- Don't do this!



# If you think you have a problem

- Suspend payments or claims until resolved.
- Investigate problem per compliance plan.
  - Consider involving attorney to maintain privilege.
- Implement appropriate corrective action.
  - Terminate or amend contract as appropriate and if allowed.
  - Remember: contract terms that violate applicable law (e.g., AKS) are void as a matter of public policy.
  - But remember that prospective compliance may not be enough.

# If you think you have a problem

- If Stark, AKS, or other statute violated, evaluate whether there is a repayment obligation under the False Claims Act.
  - FCA generally requires report and repayment within 60 days or when cost report is due.
- If repayment is due:
  - Report and repay per applicable law.
  - Consider self-disclosure program.
    - To OIG, if there was knowing violation of False Claims Act, AKS or Civil Monetary Penalties Law.
    - To CMS, if there was violation of Stark.



# Additional Resources



**REPORT FRAUD**



U.S. Department of Health & Human Services

# Office of Inspector General

U.S. Department of Health & Human Services

Report #, Topic, Keyword...   
Advanced

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## Compliance

### Accountable Care Organizations

The Affordable Care Act contains several provisions that support the development of Accountable Care Organizations to manage and coordinate care for beneficiaries.

[Read More >>](#)

### Advisory Opinions

The OIG issues advisory opinions about the application of OIG's fraud and abuse authorities to the requesting party's existing or proposed business arrangement.

[Read More >>](#)

### Compliance 101 and Provider Education

OIG developed the free educational resources listed on this Compliance 101 Web page to help health care providers, practitioners, and suppliers understand the health care fraud and abuse laws and the consequences of violating them.

[Read More >>](#)

### Compliance Guidance

The OIG has developed a series of voluntary compliance program guidance documents directed at various segments of the health care industry.

[Read More >>](#)

### I'm looking for

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- [Compliance 101 and Provider Education](#)
- [Compliance Guidance](#)
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- [RAT-STATS](#)
- [Safe Harbor Regulations](#)
- [Self-Disclosure Information](#)
- [Special Fraud Alerts, Bulletins, and Other Guidance](#)



# Additional Holland & Hart Resources

- Holland and Hart Healthcare Update and Health Law Blog
  - Under “Publications” at [www.hollandhart.com](http://www.hollandhart.com).
  - E-mail me at [kcstanger@hollandhart.com](mailto:kcstanger@hollandhart.com).
- *Health Law Basics* monthly webinar series
  - Past webinars available at [www.hhhealthlawblog.com](http://www.hhhealthlawblog.com).

# Questions?

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