The Intersection of Valuation and Physician Productivity

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Objectives

• Define Fair Market Value (FMV) and Commercial Reasonableness (CR)
  - Compare and contrast these concepts

• Identify 4 commonly-used measures of productivity
  - Discuss pros and cons associated with the use of each to determine compensation

• Identify 5 physician compensation surveys
  - Obtain a basic understanding of their use
Physician compensation arrangements and financial relationships are regulated by:

- Stark Law
- Anti-Kickback Regulations
- False Claims Act
- Private benefit/private inurement
• Stark Regulation 42 CFR 411.351 – Federal Physician Self-Referral Law and Anti-Kickback

- Prohibits physicians from making referrals for designated health services that may be paid by Medicare or Medicaid to an entity that the physician has a financial relationship with
  • Also prohibits the entity from billing those services

- Financial relationships can be direct or indirect ownership and compensation may be direct or indirect
• Designated Health Services
  - Clinical lab services
  - PT/OT and speech therapy
  - Radiology and other imaging services
  - Radiation therapy services
  - DME equipment and supplies
  - Parenteral and enteral nutrients
  - Prosthetics, orthotics and prosthetic devices and supplies
  - Home health services
  - Outpatient prescription drugs
  - Inpatient and outpatient hospital services
Stark Regulation 42 CFR – Federal Physician Self-Referral Law and Anti-Kickback

- Anti-kickback Statute – prohibits **knowingly and willfully** receiving direct or indirect payments in return for referring patients to or arranging the furnishing of services for which payment may be made under a Federal healthcare program.
Stark Regulation 42 CFR 411.351 defines fair market value as:

- “the value in arms-length transactions, consistent with the general market value. ‘General market value’ means the price that an asset would bring as the result of a **bona fide** bargaining between well-informed buyers and sellers who are not otherwise in a position to generate business for the other party, or the compensation that would be included in a service agreement as a result of bona fide bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party, on the date of acquisition of the asset or at the time of the service agreement.”
- Usually, the fair market price is the price at which bona fide sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of acquisition, or the compensation that has been included in bona fide service agreements with comparable terms at the time of the agreement, where the price or compensation has not been determined in any manner that takes into account volume or value of anticipated or actual referrals. With respect to rentals and leases described in §411.357(a), (b), and (l), “fair market value” means the value of rental property for general commercial purposes (not taking into account its intended use).
• Commercial Reasonableness
  - Seeks to frame out an acceptable structure for the arrangement
  - Despite numerous references in the regulations, CR is not defined by Stark or the Anti-Kickback statute
  - Only definition appears in the Centers for Medicare and Medicaid Services Commentary
The Stark regulations commentary (69 Fed. Reg. 16093 (March 26, 2004)) states that:

- “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 and size and a reasonable physician of similar scope and specialty, even if there were no potential designated health services (DHS) referrals.”
Examples of elements to consider:

- Term of the agreement
- Renewal/evergreen provisions
- Termination without cause provisions
- Full time/part-time employment
- Compensation terms
  - Fixed versus production formula
  - Periodic review of fixed or production formula compensation
  - Ability to adjust compensation/formula
  - Net cost of the agreement to the hospital
  - Eligibility for pension welfare and fringe benefits
Regulatory Environment – Recent Cases

- **Tuomey – Sumter, SC**
  - Federal appeals court upheld $237 million False Claims Act verdict
  - Largest levy against community hospital
  - Exceeds hospitals revenues

- **Condell Medical Center – Libertyville, IL**
  - Paid $36 million to settle alleged Stark and Anti-Kickback violations

- **Lester E. Cox Medical Centers – Springville, MO**
  - Paid $60 million to settle False Claims Act allegations

- **Halifax Medical Center – Daytona, FL**
  - Paid $85 million (plus a total of $29.4 million in legal fees) to settle Stark violation allegations
Approaches to value as related to physician compensation

- **Asset / Cost Approach**: Replicate or reconstruct the value of the services or resources provided in the compensation arrangement through a buildup of the elements or components of the same services.

- **Income Approach**: Compares the future benefits received by the buyer and/or seller under the compensation arrangement, apart from the volume or value of referrals between the parties.
Approaches to value as related to physician compensation

- **Market Approach**: Currently the prevailing method for valuing physician compensation arrangements. References comparable arrangements in the marketplace and is premised on the idea that no one will pay more for something than one would for an equally desirable substitute.
Productivity / Volume metrics to consider become major components of both compensation and determination of FMV – Critical to understand the checks and balances

- Professional collections (cash)
- Incident to (non-physician cash)
- Technical component
- Personally performed / Mid-level providers
- Charity and indigent care
Determining Fair Market Value

• Other considerations that may not be tied to revenue or cash or to productivity measures
  - Call requirements
  - Role of manager in an office or department setting
  - Quality initiatives
Recent Developments

• OIG Fraud Alert - *Physician Compensation Arrangements May Result in Significant Liability (June 9, 2015)*
  - Expanding focus on compliance to include not only the facility but also the individual physicians involved
  - Physicians are encouraged to carefully consider the terms and conditions of medical directorships and other compensation arrangements before entering into them
• OIG Fraud Alert - *Physician Compensation Arrangements May Result in Significant Liability (June 9, 2015)*
  - Draws specific attention to arrangements (such as medical directorships) between providers and their referral source physicians
    • Arrangements must be at fair market value for bona fide services that the physician actually provides
    • Compensation arrangement may violate the anti-kickback statute if even one purpose of the arrangement is to compensate a physician for their past or future referrals
Assessing Commercial Reasonableness

• Legitimate Business Purpose
  - Does the proposed arrangement represent a reasonable necessity that is essential to the mission, strategy and financial goals of the hospital or other healthcare provider?
  - Does the arrangement make rational sense from a general business perspective?
  - Does the proposed arrangement contribute to the provider’s profits or development of a needed line of service?
• Provider of Service
  - Does the arrangement require services to be performed by a physician, or other person with a special skill set/experience or specialized training?
  - Are the duties and responsibilities clearly defined in the arrangement?
  - Is the amount of time required to perform the services reasonable?
Facility Analysis

- What is the size of the facility and patient population served by that facility?
- Do patient needs dictate the necessity for a separate and distinct provider?
- Are patient acuity levels such that the arrangement is necessary?
Resource Analysis

- Does the arrangement provide a duplicative service or potential for misuse?
- Does the provider have controls and/or safeguards in place to eliminate the risk of duplication or misuse?
• Independence and Oversight
  - Are there regular evaluations of physician duties and performance and the sustained need for their services?
  - Is there a formal process for reviewing and approving proposed arrangements?
  - How are those evaluations used by the provider?
  - What types of monitoring are used by the provider?
  - Does the arrangement produce verifiable outcomes?
Determining Fair Market Value

Published Surveys

- **AMGA**
  - American Medical Group Association ("AMGA")
  - Medical Group Compensation and Financial Survey
    - Includes clinical compensation
  - Physician Compensation and Production Survey

- **MGMA**
  - Medical Group Management Association ("MGMA")
  - Includes clinical and medical director compensation
  - Physician Compensation and Production Survey

- **Sullivan Cotter**
  - Sullivan Cotter and Associates ("Sullivan Cotter")
  - Physician Compensation and Production Survey
    - Includes clinical compensation and medical director pay

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## Published Surveys

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<tr>
<th>IHS</th>
<th>HHCS</th>
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<tr>
<td>Integrated Healthcare</td>
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<td>Compensation (“HHCS”)</td>
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<td>Physician Salary and</td>
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<td>Benefits Report</td>
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- **IHS**
  - Integrated Healthcare Strategies (“IHS”)
  - Medical Director Survey
  - Includes medical director compensation

- **HHCS**
  - Hospital & Healthcare Compensation (“HHCS”)
  - Physician Salary and Benefits Report
  - Includes clinical and medical director compensation
• Considerations
  - Safe Harbor: protects an arrangement from Anti-Kickback scrutiny
    • Eliminated from Stark II Phase III (effective December 4, 2007)
    • Regulations also indicate that reference to multiple, objective, independently published salary surveys remains key for evaluating fair market value
• Considerations
  
  - Stacking / Totality of compensation
    • Total compensation and individual compensation components must all be at fair market value
    • Hours required to perform each service – are they reasonable and does it make sense individually and in the aggregate?
    • Are the hours sustainable over the term of the contract?
• Productivity / Volume metrics to consider
  - Professional collections (cash) – a real benchmark for what the physician is really producing
  - Incident to (non-physician cash) – how does this translate into an employment model where the physician does not participate in the incident to revenue
  - Technical component
  - Personally performed / Mid-level providers
  - Charity and indigent care – Is this an added burden to the physician
Determining Fair Market Value

• wRVU Analysis – Critical to understand what constitutes value
  - Modifiers: When not properly applied they can skew total wRVUs overstating or understating compensation
  - Incident to – How is physician compensated for supervision of extenders in a hospital employment model
• wRVU only can misalign hospital goals that include access or other criteria
  - Patient encounters / visits – have less value to a specialist in a wRVU but may be critical to the hospital objectives
Determining Fair Market Value

wRVU Analysis Example

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<th>CPT Code</th>
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10,981  411  8,926  9,966.63
Determining Fair Market Value – CPT Modifier Examples

- Modifier 25: **Significant, separately, identifiable E&M service by the same physician on the same day of the procedure or other services**
  - Used to describe separate, distinctly identifiable services from other services or other procedures rendered during the same visit

- Modifier 50: **Bilateral procedure**
  - Used when bilateral procedures are performed at the same session

- Modifier 57: **Decision for Surgery**
  - Used when an E&M service results in the initial decision to perform surgery
• Modifier 58: *Indicates a staged or related procedure or service by the same physician during the postoperative period*
  - Used to report a staged procedure planned at the time of the original procedure
  - When performing a second or related procedure during the postoperative period

• Modifier 59: *Distinct procedure/service*
  - Used to identify procedures/services, other than E&M services, that are not normally reported together, but are not appropriate under the circumstances
### wRVU Analysis Example - Benchmarking

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<td>7,618</td>
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**Physician Actual 2014 wRVU's**

- **9,966.83** Based on 2014 Procedure Code Analysis

**Physician Benchmarks - National**

- 15.29% Above the 75th Percentile
- -9.27% Below the 90th Percentile

**Physician Benchmarks - Southern**

- 30.84% Above the Median
- -7.08% Below the 75th Percentile
- -24.65% Below the 90th Percentile
Pros and Cons

- **wRVU**
  - Pro - designed to recognize extra effort required depending on patient acuity
  - Cons
    - errors in calculating
    - impacted by aggressive or conservative coding

- **Office visits/patient encounters**
  - Pro - relatively easy to measure,
  - Con - does not take into account the level of effort required
Quality Measures

• Vary by specialty
• Should utilize an objective methodology that is clearly defined and measurable
• Objectives need to clearly add value above the physician obligations – that is, don’t incentivize chart completion if chart completion is a requirement
• Measures should be related to the provider’s practice and consider patient population
• Measures should also consider the provider’s historical baseline data and target levels developed by national benchmarks but currently there may be limited data on the proper baseline
Factors to Consider

When converting compensation moving from a private practice to an employment model, consider how some of the drivers of practice revenue are treated and how they might change

- Ancillaries
- In-office procedures
- Mid-level providers / bundling
- Coding
  - Profile by specialty, aggressive or leaving money on the table
  - Modifiers / multiple procedures
- Advanced or multiple fellowships – do not fit neatly into the surveyed specialty
• FMV is a range of monetary values. The range may be expressed in terms of a rate per productivity measure or amount of time, but should also be considered in total.

• Commercial reasonableness is an "is" or "is not" assessment.

• Example conclusion:
  - In our opinion, compensation in the range of $X.XX to $X.XX per [productivity unit], implying annual total compensation of $XXX,XXX to $XXX.XXX, represents fair market value for the services to be performed. Based on our procedures and analyses, in our opinion, the arrangement is commercially reasonable when compensation is within this range of values.
Sanity Check

• **Total** Compensation/wRVU
• Look back to make sure agreement is applied consistent with the actual terms
• Does the arrangement make “walking around sense,” both financially and from a reasonableness perspective
  - Length of contract
  - Benefits comparable to other key positions in the hospital
  - Full-time v. part-time
Questions?

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