A Practical Approach to Conducting “Stark” Audits of Hospital-Physician Arrangements

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Overview

1. Brief summary of key Stark exceptions
2. Why conduct an audit of “physician arrangements”?  
   – Enforcement initiatives
   – Impact of the Health Care Reform Law
   – Other compliance-related issues
3. Pre-audit considerations
Overview (Cont’d)

4. The process and strategy for audits
   – Attorney-Client privilege?
   – Hospital managers and internal politics
   – Audit priorities
   – Audit steps and plan of action

5. Common issues found and possible solutions
   (lessons learned; war stories)

6. Recommended process for avoiding compliance issues

Summary of Key Exceptions

• Threshold issues:
  – Is there a physician “referral” to the hospital?
    (if so, almost always = Medicare/Medicaid DHS)
  – Does the physician have a financial relationship with
    the hospital?
    • Ownership interest
    • Compensation arrangement — both ways:
      – Items/services provided by physician to hospital
      – Items/services provided by hospital to physician
Overview of Common Exceptions

- If ownership by physicians — different exceptions and analysis
- Key exceptions for “compensation” type financial arrangements:
  - Rental of Office Space/Equipment
  - Personal Service Arrangements
  - FMV Compensation
  - Indirect Compensation Arrangements

Stark Exceptions: Common Requirements

1. In writing, signed by the parties, and specifies services or property covered
2. Compensation is set in advance and consistent with FMV
3. Does not take into account the volume or value of referrals or other business generated between the parties
4. Would be commercially reasonable even if no referrals were made between the parties
Is there an “Indirect Compensation” Arrangement?

Physician

Ownership & Compensation

Physician Group

HOSPITAL

Does it vary based on physician referrals to the hospital?

Physician as Owner of Group

Is there an “Indirect Compensation” Arrangement?

Physician

Employment Compensation

Physician Group

HOSPITAL

Does it vary based on physician referrals to the hospital?

Physician as Employee (Non-Owner)
Indirect Compensation Exception

- “Stand in the Shoes” Doctrine:
  - A physician owner is deemed to “stand in the shoes” of his medical group if the only entity between the physician and the hospital is the group
  - Effective: December 2007
  - Result: physicians that previously relied on the absence of indirect compensation (or meeting the indirect exception) may now need to rely on a direct compensation exception

Why Conduct an Audit?

Recent Enforcement Activity

1. Halifax Hospital Medical Center
2. Cayuga Medical Center
3. Detroit Medical Center
4. Select Medical Corporation
5. Rush University Medical Center
1. Halifax Hospital Medical Center

- United States partially intervened in False Claims Act suit against Halifax Hospital Medical Center
- Alleges contracts with nine physicians violated Stark Law
  - Six medical oncologists were paid kickbacks in the form of “incentive compensation pool” (profit sharing)
  - Three neurosurgeons’ compensation above FMV/commercially unreasonable
- Qui tam plaintiff (Director of physician services)
- Suit pending (November 2011 DOJ intervention complaint)

2. Cayuga Medical Center

- Entered into improper physician recruitment agreements with various medical practices
  - Paid for unpermitted expenses
  - Improperly extended a recruitment agreement
- Voluntarily disclosed additional improper recruitment agreements
- Qui tam plaintiff (Plastic surgeon from Ithaca)
- Settlement = $3.57 million ($560k to relator)
3. Detroit Medical Center

- Voluntary disclosure to United States in connection with sale to Vanguard Health Systems
- Entered into improper financial arrangements with physicians
  - Failed to have written, fully executed leases
  - Failed to have written, fully executed financial arrangements
  - Financial arrangements not FMV/commercially reasonable.
  - Provided impermissible "business courtesies" to physicians
  - Provided signage and/or advertising and biographical materials not FMV/commercially reasonable
- Used improper billing codes
- Settlement = $30 million (determined based on ability to pay)

4. Select Medical Corporation

- Paid physicians for no-show medical directorships
- Settlement = $7.5 million ($1.3 million to relator)
- Quit tam plaintiff (former regional director of provider relations)
- Five year Corporate Integrity Agreement
5. Rush University Medical Center

- Entered into improper office lease arrangements with individual physicians and physician groups
  - Failed to have written, fully executed leases
  - Made rent concessions to physicians
  - Failed to collect rent timely and regularly
- Qui tam plaintiffs
  - Orthopedic surgeon on medical staff; and
  - Former Director of Real Estate for hospital
- Settlement = $1.5 million ($270K to plaintiffs)

New Health Care Reform Law

Impact on Enforcement

- Easier to enforce (fewer defenses)
  - Anti-Kickback Statute
    - No specific intent required
    - Kickback violation constitutes a false claim
  - FCA
    - Revised public disclosure/original source provisions
  - More funding
  - Bi-Partisan support for anti-fraud, unlikely repeal
New Health Care Reform Law

Additional Program Integrity Measures

- Overpayment liability
  - Must report/return overpayments within 60 days after the overpayment is “identified”
  - Failure may result in FCA liability
- Enhanced Penalties
- Expansion of RAC program
- Self-Referral Disclosure Protocol

THE BIGGER PICTURE

Increased Funding and Success

Health Reform
$300 million+

FY 2013 Budget Proposal
$1.9 Billion

Fraud and Abuse

Since 1997
$21 Billion

Return-on-Investment
5 to 1

2011 Recovery
$4.1 Billion

RECORD RECOVERY

Sills Cummis & Gross PC
Other Reasons to Audit Physician Arrangements

- Demonstrate “effectiveness” of Compliance Program
- Long-Term Savings
  - Avoid penalties
  - Avoid overpaying physicians
  - Avoid “freebies” to physicians
- Related IRS tax-exempt compliance

Pre-Audit Considerations

- Cost of Audit
  - Management time (CO, GC, Finance, Mgmt.)
  - Cost of vendors (attorneys, auditors, etc.)
- Ability to follow through ….
  - New procedures?
  - Internal “political” issues
  - Dealing with physicians
The Process of Conducting an Audit of Physician Arrangements

Step One: Decide if the audit should be part of an internal investigation at the direction of outside legal counsel

Considerations:
- Protection of Attorney-Client Privilege
- Cost issues?
  - Hourly vs. flat fee vs. hybrid fee arrangements
- Internal politics

Audit Process (Cont’d)

Step Two: Determine Audit Priorities

- **Top Tier** (“lowest lying fruit” for enforcement)
  - No Written Agreement Ever
  - Free Space/Services; “No Show” Positions
- **Second Tier** (“low lying fruit”)
  - Expired Agreements and Leases
  - Clearly Not FMV/Commercially Reasonable
Audit Process (Cont’d)

• Third Tier: Compliance with 2008 Stark changes
  – Per click & percentage-based payments
  – Under arrangement restrictions
  – Physician recruitment requirements

Audit Process (Cont’d)

• Fourth Tier: Compliance with agreement terms
  – Performing all duties? Number of hours? Time logs?
  – Paying as per terms of agreement (increases, etc.)?
  – Physician recruitment - ongoing compliance with terms (e.g., only incremental costs, etc.)?
  – JVs – pro rata distributions; 1/3 rules; referral limits?
Audit Process (Cont’d)

Step 3:
Gather Facts
Gather Contracts
&
Triage

Audit Process (Cont’d)

Priority 1.A.: Non-employed physicians (no written agreement; no show positions)

- Finance Dep’t — computerized list of 1099 payments to physicians/groups, and accounts payable list of payments to physician groups/entities (time period?)

- **Triage** — Initial Focus:
  - Was there ever a written agreement?
  - Compare to physician arrangement database
  - Review all agreements and other “writings”
  - Are there any “no show” positions?
**Audit Process (Cont’d)**

**Priority 1.B.: No Lease; Free Rent/Staff/Services/Items**

- Obtain from managers a list of any hospital space/equipment and staff/service/items being provided to physicians for private practice
- **Triage** – Initial Focus:
  - Is hospital space, equipment, staff, services or items being provided to physicians for free/clearly below FMV?
  - Is there a written agreement for each?

**Audit Process (Cont’d)**

**Priority 2.A.: Expired Agreements; or Clearly not FMV**

Secondary Focus for 1099s and Leases:

- Are the contracts expired?
- Are terms clearly not (no longer) FMV & commercially reasonable? (“Smell Test”)
  - Have the duties/hours changed substantially?
  - Are there overlapping duties?
  - Has the space changed substantially?
  - IRS misclassification initiative — Independent Contractor vs. Employee
Audit Process (Cont’d)

Priority 2.B.: Employed Physicians; Clearly not FMV

– Finance Dep’t — computerized W-2 run payments to all physician employees (time period?)
– Triage:
  • Initial focus on part-time employees (then full-time)
  • Are terms clearly not (no longer) FMV (“smell test”)
    – Have the duties/hours changed substantially?
    – Are there overlapping duties?

Audit Process (Cont’d)

Priority 3: Regulatory Changes

– Review arrangements for compliance with 2008 Stark law regulatory changes
  • Identify any “per click” and percentage-based arrangements
  • Identify any “under arrangements”
  • Review physician recruitment deals
– Joint Commission (LD 3.50)
  • Monitor and oversee services by outside providers
  • Confirm performance of duties and quality
– Compliance with DRA requirements
Priority 4: Compliance with Agreements

– Require Manager/VP with responsibility to fill out a form annually certifying:
  • they have reviewed the contract
  • all duties are still being performed as required
  • there are no performance problems/issues
  • financial terms are consistent with FMV

Priority 4 – Auditors to consider:
  • Are all listed duties being performed?
  • Are quality services being provided?
  • Are detailed logs being submitted?
  • Are hours as initially envisioned?
  • Has the FMV of the arrangement been reviewed in the last 2-3 years?
Audit Process (Cont’d)

Priority 4 – Auditors to consider (Cont’d)

• Are payments being made as specified?
  – Based on logs/duties?
  – Bonus calculations?
  – Has rent increased as per terms?
  – Are pass-throughs being paid?

Audit Process (Cont’d)

Priority 4 – Auditors to consider (Cont’d)

• Income guaranties (only paying actual incremental costs, etc.)

• Joint ventures — Are key compliance-related terms being followed
  – Pro rata investment & distributions
  – Two one-third rules for ASC safe harbor
  – 40% referral limitations for other safe harbor
Audit Process (Cont’d)

Step 4:

Implement a plan of action for arrangements with actual or potential compliance issues

Audit Process (Cont’d)

Plan of Action:
1. Immediately correct going forward
   - Put terms into signed agreement
   - Sign letter of extension for expired agreements/leases
   - Sign amendment to reflect changed terms
     - Be careful to comply with Stark law guidance regarding amendments
   - Adjust to FMV
Audit Process (Cont’d)

Plan of Action (Cont’d)

2. Assess risks and options for what to do about past compliance issues
   – Bona fide arguments of compliance?
   – Pros and cons of self-disclosure?
   – Must report/discard if clear fraud/violation
   – Very complicated and fact-dependent
   – Overpayments must be reported/returned within 60 days of identification

Common Issues/Solutions - Lessons Learned

1. No signed agreement
   – Threshold issue: Is there an argument that there is no “indirect compensation,” and that no exception was needed?
     • December 2007 and before if physician owners of a medical practice
     • Maybe beyond if only physician employees of a group are involved
No Signed Agreement (Cont’d)
– Else, what documents & signatures exist?
– Look to State law regarding whether there is a binding agreement?
– May not need a single document (Villafane)
– Temporary Noncompliance
  • Very limited
  • 90 days – inadvertent
  • 30 days – not inadvertent

No Signed Agreement (Cont’d)
– What to look for:
  • Exchange of letters, emails, etc.
  • Job descriptions, reports of services, etc.
  • Invoices, payment requests, check requests, etc.
  • Checks, check stubs, endorsed checks, etc.
2. Expired Contracts and Leases
   - Any argument that there is no "indirect compensation"? (At least up to 12/07)
   - If not, are there any written indications of extension or continuation of terms?
   - Implied extension based on course of dealing?
     • May depend on State law?
     • Not if new services or terms (*Kosenske*)
     • May be limited by 6 month holdover provision
   - Possible argument — extension of arrangement that is still reflected in a signed writing

3. New or Changed Duties/Hours
   - Look for anything in writing confirming new or different duties or hours
     • Exchange of letters, emails, etc.
     • Job descriptions
     • Reports of services, etc.
     • Invoices, payment requests, check requests
     • Minutes of meetings
   - Equal swap? Same Hours? Higher value?
4. No FMV Assessment; Stale Assessment
   - Conduct internal assessment or re-assessment to "ballpark" figures
   - Preferably, use outside FMV consultant
     • $__k or more per year?
     • Extensive/complicated arrangements
     • Cost considerations
   - Letter from local commercial real estate broker regarding space leases
   - Look for bona fide argument that arrangement is FMV

Recommended Process for Avoiding Compliance Issues

- Adopt a Physician Contracting Policy
  - Implement for all new/renewed agreements
  - Train and hold managers accountable
    (initial term sheets, “no log, no pay,” annual manager certifications, etc.)
- Adopt a Stark Audit Policy
  - Conduct select audits each year based on priorities
    (Don’t try to do it all at once)
- Implement the policy that is adopted
- Clean up the past (else repeat issues)
- Be “clean” moving forward
Questions & Answers

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