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If you're expanding, don't overshoot fair market value — or you may face the feds

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Compliance

The fallout of a recent whistleblower case involving physician practice acquisitions serves as a warning that, if you're making a big deal to grow your practice, you must have either a safe harbor or a really good explanation.

The case, involving big-ticket acquisitions made by Indianapolis-based Community Health Network (CHN), alleges that the health system compensated providers significantly over fair market value (FMV) in order to roll up referrals from their practices, which would be in clear defiance of Stark law.

Specifically, the *qui tam* case that the U.S. Attorney in the Southern District of Indiana joined against CHN alleges that the hospital network "integrated" physicians with existing business in lucrative specialties, such as cardiology, OB-GYN and advanced imaging, into CHN and paid them well above FMV and even "paid bonuses on physicians achieving a minimum target of referral revenues to the hospital." Federal auditors and compliance officials consider FMV a reasonable estimate of true worth based on what is normally paid in the market.

"CHN recruited physicians from the local Indianapolis market many of whom already had staff privileges, practiced at, and/or referred patients to a CHN hospital or affiliated facility," the complaint alleges. "These integrations were 'defensive' in nature, meaning that CHN recruited and employed these physicians to secure their referrals and out of concern that their referrals would 'leak' to CHN's local competitors."

Running afoul of Stark

The intentional grab at referrals, the complaint claims, puts CHN in violation of the Stark Law, which prohibits referral of designated health services (DHS) if a physician or an immediate family member has a financial relationship with the referrer, unless a specified safe harbor applies. The government also brings False Claims Act charges, as it asserts CHN's "claims for those referred services were not eligible for payment."

Plaintiffs offer evidence that suggests CHN knew they were skirting the law. The amended complaint in the case posted Jan. 6 claims that CHN ignored consultants' advice that their rates far exceeded FMV. For example, the complaint alleges that one consultant's comparison "showed that the average actual compensation for the cardiologists in 2007 was $397,000 per physician." Under the CHN compensation plan, cardiologists would be paid an average of "$803,000 per physician, an increase of 102%." In some cases, CHN allegedly withheld details of compensation data from the consultants in hopes of obtaining a more favorable analysis.

What's worse, the whistleblower claims to have documentation showing that CHN executives were counting on a stream of referrals to justify the large compensation packages they were offering.

"Basing compensation of any kind based on the value or volume of referrals violates Stark [and] anti-kickback laws, no matter if the employer is a hospital or small practice," says Heather Macre, an attorney and director of the business litigation department at the Fennemore Craig law firm in Phoenix, Ariz. "I do think that the CHN case likely drew additional scrutiny, as this was a hospital as opposed to a small practice," Macre adds. "But this compensation arrangement would be problematic in any sort of health care setting where Medicare or Medicaid is a payer."

"Even stronger than the claim that the pay was above FMV is the allegation É that CHN also conditioned awarding incentive compensation to its physicians on the physicians meeting a target of 'hospital downstream revenue specific to the physician,'" says William Maruca, an attorney with Fox Rothschild in Pittsburgh. "This is blatantly illegal if true."

Beyond Stark: Anti-kickback and false claims

Blatant illegalities aside, the case shows how seriously the feds can take it if they think you're trying to game the system by hiring providers who currently have lucrative practices on exorbitant terms.

"Stark is a strict liability law," says Kathy H. Butler, officer and attorney in the health care practice group at Greensfelder, Hemker & Gale in St. Louis. That is, proof of intent is not required; you either followed the law or you didn't.

"If a hospital has a financial arrangement — any kind of financial arrangement — with a physician who refers to the hospital, the arrangement must fit with an exception, and it has to meet every single element of that exception," Butler cautions. "Even if the physician is employed, there are rules about how those physicians can be paid bonuses. In every financial arrangement, the physician's compensation must be FMV and commercially reasonable."

If CHN is shown to have a non-compliant relationship, "during the time the relationship is non-compliant, the hospital has to return all the reimbursement it receives from any Medicare or Medicaid service referred by that physician," Butler adds.

Maruca points out that there's a heightened danger of anti-kickback statute and false claims charges for such cases, thanks to precedents such *U.S. v. Borasi,* which "makes it even easier to prove an AKS [anti-kickback statute] and False Claims Act violation when there is evidence of subjective intent to induce or reward referrals," he says. "If one purpose of a transaction is to compensate for or receive referrals, the single purpose is sufficient to establish a violation."

Accurately assess value, avoid trouble

Fortunately, while Stark is a strict liability law, FMV is fungible. "By definition, pay in excess of FMV is improper, but FMV is a flexible standard and may become even more flexible if the proposed rule changes [for Stark] are adopted," Maruca says (see story, p.3). "Saying that pay exceeds FMV is a conclusion. Technically, the highest-paid doctor in a particular specialty in a database can satisfy FMV."

"Compensation can be based on production; bonuses can be based on productivity," Macre says. But just keep in mind that "all compensation needs to be in keeping with the fair market value for similar work."

That value can also fluctuate with circumstance. For example, "providers in a small market, a rural area, may have a hard time attracting and retaining doctors. Sometimes it takes more money to get them to relocate," Butler says. "In that case, to protect yourself, providers should document community need, recruitment efforts and offers made, to show that [usual FMV metrics] are just not working. There can be good reasons for paying what might seem to be above what other doctors are getting."

The trick "is making sure there is objective evidence to support that analysis," Butler advises. It helps to look at standards and compare your arrangement to them, which is what CHN did, although it allegedly dismissed that evidence . You can hire consultancies or valuators, such as Sullivan Cotter, to run analytic tests based on compensation benchmarks to see whether you're in the red zone as far as fair market value is concerned.

"If there's a question, get an opinion," Butler says."It's worth the money."

4 tips to stay in line

- **Get a second opinion.** "I usually ask my clients to hire two different consulting groups, if they can afford it, to perform a FMV [analysis] and go with the average of those two results," says Jamaal R. Jones, Esq., a health care attorney with Jones Health Law in Coconut Grove, Fla.
- **Pick a valuator that understands health care.** "We've had valuations that were just useless because they were made by general business valuators who didn't understand industry standards," Butler says. Vet your valuator to ensure they can put a realistic cost on health care services
- **Don't lie.** "Valuators always have disclaimers that they rely on what you've given to them," Butler says, "so if you lie, it has no value."
- **Run it by your lawyer.** Do this everytime. — *Roy Edroso (redroso@decisionhealth.com)*

Resource:

DOJ press release: www.justice.gov/opa/pr/united-states-files-false-claims-act-complaint-against-community-health-network