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The American Bar Association’s Health Law Section

Fair Market Value & Commercially Reasonable Overview: Physician Compensation
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Introduction

- Managing Director at VMG Health and with the company over 10 years
- Leads Professional Service Agreements Division
- Previously with KPMG’s Litigation Services practice
- Former Finance professor from the University of North Texas
- Integral in developing internal compensation processes for some of the largest health systems in the country
- Published / presented over 50 times related to physician compensation and fair market value with recent P4P emphasis
- *Lens: 3rd party valuation expert with high-level understanding of legal, compliance and business strategy.*
Expertise in Healthcare Valuation Needed
Both Valuation and Healthcare Experience Essential

Professional Credentials – Valuation Experts

- VMG Health professionals earned the following credentials:
  - The CFA Institute: Chartered Financial Analyst (“CFA”)
  - AICPA Certified Public Accountant (“CPA”)
  - Accredited in Business Valuation (“ABV”)
  - Accredited Senior Appraiser (“ASA”)
  - Certified Valuation Analyst (“CVA”)
  - Member, Appraisal Institute Real Estate Appraisers (“MAI”)

Organizations Served through VMG’s Speakers Bureau – Thought Leaders in Healthcare

Co-present with government, outside/inside counsel and healthcare executives

- VMG Health team members speak/write/belong to the following associations (sample):
  - American Bar Association Health Law Section (ABA)
  - American Health Lawyers Association (AHLA)
  - Ambulatory Surgery Center Association (ASCA)
  - Healthcare Financial Management Association (HFMA)
  - Health Care Compliance Association (HCCA)
  - Physician Hospitals of America (PHA)
  - Numerous state health law associations
  - Numerous state hospital associations
VMG HEALTH FAST FACTS

100+ VALUATION PROFESSIONALS

20 YEARS OF EXPERIENCE

25,000+ ENGAGEMENTS COVERING EVERY VERTICAL

4,153 VALUATION ENGAGEMENTS IN 2015

VMG HEALTH ADVANTAGE

VMG Health helps small and large complex health systems aggregate valuation and transaction advisory activities resulting in operational time efficiencies and volume pricing economies that can be reallocated to more valuable, mission-fulfilling endeavors.
## Compensation Arrangement Types & Trends

*FMV and commercially reasonable continues to gain importance in recent settlements*

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*P4P component – newest challenges for determining FMV

Varying internal processes for setting compensation across country – caution with certain products/licensing issues
Leading / Thinking / Performing

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 (or family member or group practice) of similar scope and specialty, even if there were no potential DHS (designated health services) referrals. (69 Federal Register (March 26, 2004), Page 16093)

- Pre-cursor to determining FMV
- Arrangement must make business sense absent considering referrals
- Hospital leadership must understand this standard since they will primarily be the individuals who assess CR. Sample considerations:
  - Operational assessment – does the community need this service/number of specialists?
  - Physician requirements – are the number of hours required?
  - Financial options – can you lease equipment from a third party vendor at a better rate than from a physician group?
- Counsels role – did hospital leadership walk through the business considerations?
- Valuation firm role – is the compensation at FMV?
What is Fair Market Value?

“Fair Market Value” is defined in Stark, 42 U.S.C. 1395nn(h)(3), as the value in arm’s-length transactions, consistent with the general market value…the compensation that would be included in a service agreement as the result of a 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. (42. C.F.R. 411.351)

Stark II Phase II Commentary adds this clarification:

- The methodology must exclude valuations where the parties to the transactions are at arm’s-length but in a position to refer to one another. (69 Federal Register (March 26, 2004), Page 16107)

Preamble Stark Phase I Commentary adds this clarification:

- Depending on the circumstances, the “volume or value” restriction will preclude reliance on comparables that involve entities and healthcare providers in a position to refer or generate business. (66 Federal Register (January 4, 2001), Page 945)
Agreements should carefully be constructed

- Compensation should not be tied to expected or actual referrals. This is important when establishing compensation or when setting mechanism to drive compensation.
- Carefully construct alternative payment models (gainshare, MSSP, ACO, bundled payments) since often tied to other (non-physician) income streams.

Do not determine FMV based on

- What the hospital next door is paying.
- Non-comparable services and associated fees (ie: management vs. co-management).
- Solely on opportunity cost of the physician performing a different service, or their “going rate” (surgery vs administrative work).
Compliance Checklist – Traditional Arrangements

• Medical Directorships - Document services and track time, pay hourly

• Call coverage – understand the burden of call per OIG opinions, caution on surveys

• Clinical services and employed compensation
  - Benchmark productivity – average productivity warrants average compensation
  - Losses in a practice - understand reason (safety net hospital, restricted coverage, coordinated care costs)
  - Stacking – total dollars and hours make sense?

• Best Practice - internal policies for compliance:
  1. A consistent process to determine FMV, including written agreements
  2. Internal thresholds with triggers when a 3rd party appraisal may be needed
  3. Monitor to ensure that services were performed
  4. Review agreement to verify the need for services still exist
  5. Understand and verify the assumptions underlying any valuation
Compliance Checklist – P4P Arrangements

Quality Payments
- Metrics outlined
- Primarily outcomes metrics (versus process or reporting)
- Be careful with low hanging fruit metrics
- Benchmark performance against medical credible evidence
- Ensure physician(s) will have demonstrable impact on quality
- Check for overlap of payments from co-management, bundled payments, etc...

Shared Savings
- No cherry picking or lemon dropping
- Identify separate identifiable cost savings opportunities in advance
- Ensure physician(s) will have demonstrable impact on cost savings

✔ Consider methodology applied in CMS models
✔ Understand the risk and responsibility of parties prior to determining quality or savings payments
FMV Take-Aways for Physician Compensation

1. Outline what ‘commercially reasonable’ services will be provided and how parties will be compensated

2. Valuation should match the agreement - may require several valuations for one agreement (clinical, administrative, on-call, P4P)

3. Thorough valuation process to establish compensation should be tied to each of the services provided

4. Establish and monitor a compliant and consistent process for establishing FMV

5. Checklist when reviewing a valuation
   - Understand recent settlements – beware of documentation regarding referrals or no documentation regarding services
   - Reference to multiple, objective, independently published salary surveys remains a prudent practice for evaluating Fair Market Value
   - Valuation method and benchmarking is important
   - Consider regulatory guidance, recent settlements and OIG opinions (shared savings, on-call beeper rate, excessive losses)
   - Methods that won’t hold up
     - Compensation models built on referrals
     - What hospital next door is paying

6. New challenge – transition to compensate physicians on quality and cost-saving outcomes rather than being reimbursed solely for services and procedures. There is a lack of survey data and guidance here.
Jen Johnson is a managing director with VMG Health and oversees the Professional Service Agreements Division. Her expertise is related to the in-depth knowledge required to understand the fair market value challenges, market data, and regulatory guidelines associated with valuing professional service arrangements associated with both healthcare systems and life sciences companies. She has been an expert witness and is an editor for the Journal of Hospital Administration.

Mrs. Johnson is dedicated exclusively to the valuation of compensation agreements, and has been integral in developing internal compensation tools for some of the largest health systems in the country. She also provides full FMV opinions for any type of compensation arrangement including clinical services, administrative services, call coverage, co-management agreements, and pay for performance arrangements, which include both shared savings and quality incentives. She is routinely published on these topics nationally through organizations such as the American Health Lawyers Association, the American Bar Association, the Health Care Compliance Association, and the Healthcare Financial Management Association.

Mrs. Johnson began her valuation career with KPMG, LLP in their Forensic and Litigation Services Department in 1998, where she worked directly under experts in the field of finance, accounting, and economics. She also worked at the University of North Texas as a finance professor. Prior to that, she earned her BBA and MBA in Finance as well as the Chartered Financial Analyst designation, while working for several companies in a consulting capacity. Her consulting work included business valuation, financial projections, and operational systematizations.