

ACO Valuation Issues and Economic Challenges in light of the Regulatory Guidance

AHLA Fraud and Compliance Forum

October 1-2, 2012

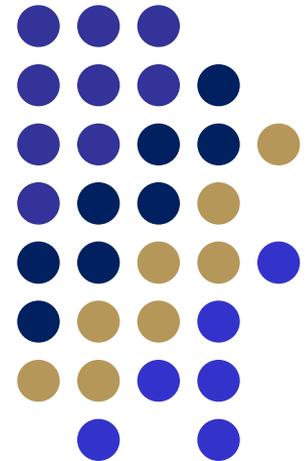
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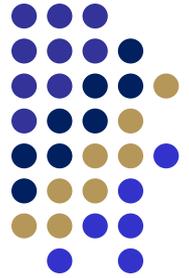
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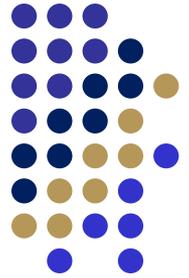


Presentation Overview



- ACO/MSSP Marketplace Today
- Medicare Shared Savings Program risk profile tracks
- Overview of MSSP waivers
- Is there any need for a valuation of ACO transactions?
- The IRS guidance
- Which “fair market value” standard is correct
- ACO’s involving private insurance carriers
- Risk of government revisions to the waivers
- Example of a Transaction
- Questions

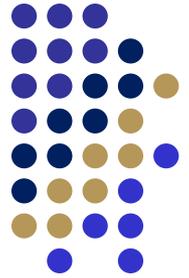
ACO/MSSP Market So Far



As of July 9, 2012:

- 154 ACO's have entered agreements with CMS
 - 89 new ACO's began serving Medicare patients in 40 states & DC
 - 32 ACO's participated in testing of the Pioneer ACO Model
 - 6 ACO's in Physician Group Practice Transition (PGP)
- Over 2.4 million beneficiaries receiving care from ACOs
- Recent JAMA study reports "modest" annual savings with PGP demo (\$114 per patient; \$532 per dual eligible patient)

MSSP Risk Profile Tracks



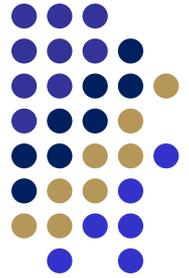
Two Tracks – important to know which track applies:

- No risk of loss – 50% of Medicare savings paid to ACO
- Risk of Loss – 60% of Medicare savings paid to ACO

Related Questions about Risk Tracks:

- Is the value of ACO contributions affected by relative risk of loss?
- Can ACO Losses be carried forward and applied toward future savings?

Final MSSP Waivers



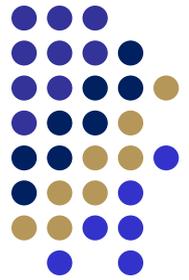
Types of Waivers

- Pre-participation Waiver
- Participation Waiver
- Shared Savings Distribution Waiver
- Compliance with Physician Self-Referral Law Waiver
- Beneficiary Inducement Waiver

General Standard:

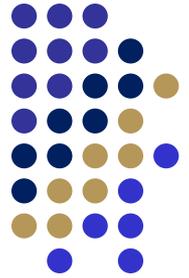
- Reasonably related to the purposes of the MSSP
- No requirement for written and signed agreement
- No requirement for FMV or commercial reasonableness
- Limited to MSSP

Need for Valuations of ACO Transactions



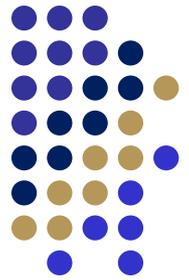
- **OIG/CMS provided broad waivers of Stark and Anti-kickback statute requirements for ACO's that participate in the Medicare Shared Savings Program ("MSSP")**
 - But **OIG/CMS left the door open to reconsidering those waivers in the future if there is widespread abuse**
 - **What does that mean for non-FMV transactions?**
- **IRS guidance less clear (for non-profit organizations)**
 - **While FMV may not be required in all cases, it is a factor that helps determine whether an impermissible private benefit exists.**
 - **Earnings, including any MSSP savings payments, must be split in proportion to ACO contributions – including contribution of services, which may require a valuation.**

IRS Guidance



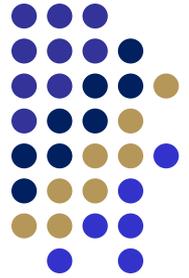
- March 2011 – IRS guidance – To avoid impermissible private benefit:
 - Transactions must meet IRS five factor test, including that compensation under any compliant transaction must be consistent with FMV.
 - Participants in MSSP must share the net ACO earnings, including any shared savings in proportion to their cash contributions to the ACO.
- October 2011 – IRS revised guidance - clarified key points:
 - Not all five factors in the test must be met in every transaction, including FMV.
 - Relevant measurement of contributions to ACO is all contributions, including cash, property and services, not just cash.

IRS Guidance



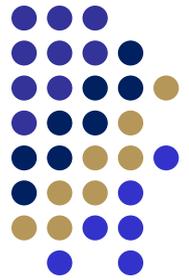
- Five Factors used to determine private benefit:
 - Terms set forth in advance in writing, negotiated at arm's length;
 - ACO accepted into MSSP and remains in good standing;
 - Each party's share of economic benefits (including shared savings payments) is in proportion to its contributions made to ACO;
 - Each party's share of losses does not exceed share of economic benefits to which party is entitled;
 - All transactions with ACO/ACO participants are at FMV.
- Will the IRS be satisfied if a large number of transactions meet the other 4 factors, but compensation is repeatedly inconsistent with FMV.
- Similarly, what if the magnitude is of compensation is significantly in excess of FMV (2x or 3x larger, etc.)?

IRS Guidance



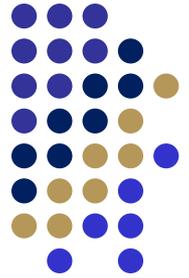
- Earnings, including any MSSP savings, must be split in proportion to ACO contributions, but how are contributions measured?
 - When parties bring different items to the table, difficult to measure their relative contributions - When is 50/50 split fair vs. some other split?
 - What is really being provided by physicians? – in some cases it is more extensive care up front, to reduce long-term program costs - measuring that type of contribution is a significant challenge.
 - Does an FMV standard apply to the value of the services, or can some other standard of value be used?
 - What about contributions that cannot be predicted in advance? – Dr. X will provide Medical Director services of up to 40 hours per month – how many hours are counted?
 - What if a physician is also paid for his or her services, can that be counted toward their contribution to the ACO?
 - What if actual pay is below the upper limit of the valuation range for the services - can the difference be counted?

Which Valuation Standard is Correct?



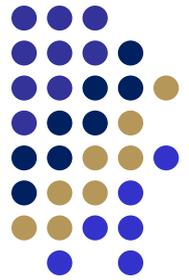
- What is the correct standard?
 - Stark and Anti-Kickback FMV Standard?
 - IRS notions of FMV from Rev. Ruling 59-60
 - Can the valuator consider the volume or value of referrals between the parties
 - FMV vs. Strategic value or Investment value

Which Valuation Standard is Correct?



- Stark Definition of FMV:
 - The value in arm’s-length transactions, consistent with the general market value.
 - “General market value” means the compensation that would be included in a service agreement as the 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.**
 - “...the definition of “fair market value” in the statute and regulation is qualified in ways that do not necessarily comport with the usage of the term in standard valuation techniques and methodologies. For example, 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.***” [emphasis added]

Which Valuation Standard is Correct?

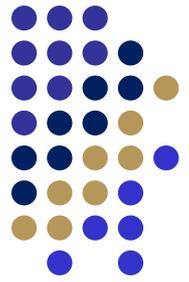


- Anti-Kickback Guidance on FMV from OIG:

“The general rule of thumb is that any remuneration flowing between hospitals and physicians should be at fair market value for actual and necessary items furnished or services rendered based upon an arm’s-length transaction and should not take into account, directly or indirectly, the value or volume of any past or future referrals or other business generated between the parties.”

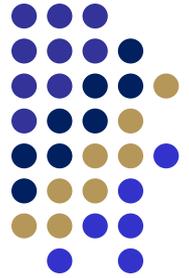
Arrangements under which hospitals (i) provide physicians with items or services for free or less than fair market value, (ii) relieve physicians of financial obligations they would otherwise incur, or (iii) inflate compensation paid to physicians for items or services pose significant risk. In such circumstances, an inference arises that the remuneration may be in exchange for generating business.”

Which Valuation Standard is Correct?



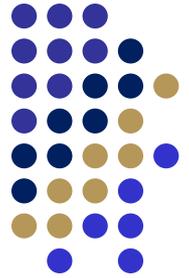
- IRS Revenue Ruling 59-60
 - Lots of guidance, discussion and information available
 - Outlines 3 major approaches to value
 - Cost, Income and Market Approaches
- As restated in “International Glossary of Business Valuation Terms” – definition of FMV:
 - The price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

Which Valuation Standard is Correct?



- Compare Stark, Anti-Kickback and IRS Definitions of FMV with Investment Value
- Investment Value (or Strategic Value):
 - The value to a particular investor based on individual investment requirements and expectations.
- Is the volume or value of referrals really just “strategic value” anyway?
 - Answer: Not necessarily.

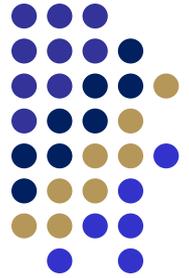
ACOs with Private Insurers



Sharing savings to commercial payors with ACOs

- No government guidance yet on this yet
 - No payments for Medicare beneficiaries
 - The problem with “carve out” payments
 - Stark Law’s risk sharing exception
- How do any payments from commercial payors impact the split of the MSSP payments?

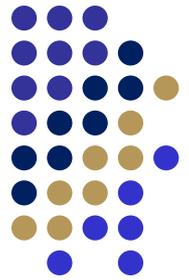
Risk of Changes to Waivers



If the waivers are modified or rescinded:

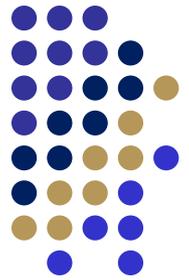
- What if IRS vs. Stark FMV standard used?
- If deal unwound, what happens to any savings earned?
- Does value of deals need to include some factor for the possibility of change to the waivers?

Hypothetical Example



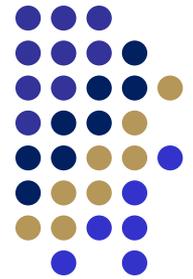
- Hospital contributes cash - \$2MM per year
- Physician Group contributes services – value uncertain
- Parties desire to 50/50 split the net earnings/losses, including shared savings
- Shared savings – projected to be \$0 to \$5MM

Hypothetical Example



- Two possible scenarios
 - Amount needed to justify the desired split (\$2MM) is within the FMV range for the value of the physician's contributed services (e.g., FMV ranges from \$1.5MM to \$2.2MM)
 - Amount needed to justify the desired split is outside the FMV range for the value of the physician's services (e.g., FMV ranges from \$1.2MM to \$1.8MM)

Hypothetical Example

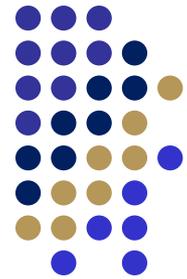


Shared Savings Amount \$5,000,000

	Hospital	Physicians
Contribution	\$2,000,000	\$2,000,000
<i>% contribution</i>	<i>50%</i>	<i>50%</i>
Shared Savings Split	\$2,500,000	\$2,500,000
Net Earnings	\$500,000	\$500,000
<i>Net Earnings Split %</i>	<i>50%</i>	<i>50%</i>

	Hospital	Physicians
Contribution	\$2,000,000	\$1,800,000
<i>% contribution</i>	<i>53%</i>	<i>47%</i>
Shared Savings Split	\$2,600,000	\$2,400,000
Net Earnings	\$600,000	\$600,000
<i>Net Earnings Split %</i>	<i>50%</i>	<i>50%</i>

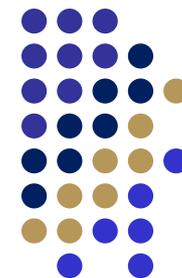
Hypothetical Example



Shared Savings Amount \$0

	Hospital	Physicians
Contribution	\$2,000,000	\$2,000,000
<i>% contribution</i>	50%	50%
Shared Savings Split	\$0	\$0
Net Earnings	(\$2,000,000)	(\$2,000,000)
<i>Net Earnings Split %</i>	50%	50%

	Hospital	Physicians
Contribution	\$2,000,000	\$1,800,000
<i>% contribution</i>	53%	47%
Shared Loss Payment	\$100,000	(\$100,000)
Net Earnings	(\$1,900,000)	(\$1,900,000)
<i>Net Earnings Split %</i>	50%	50%



Questions?

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