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Allison Pullins (apullins@mdranger.com, linkedin.com/in/allisonpullins/) is Chief Strategy and Operations Officer at MD Ranger Inc., Menlo Park, CA.

Brian S. Colonna (brian.colonna@renown.org, linkedin.com/in/brian-colonna-mhl-chc-chpc-chrc-647a7b15/) is Director of Compliance Program at Renown Health, Reno, NV.

Terence Ou (terence.ou@huntingtonhospital.com) is Vice President, Enterprise, Compliance, Risk and Internal Audit at Huntington Hospital, Pasadena, CA.

Creating an FMV policy that works for your organization

by Allison Pullins, Brian S. Colonna, MHL, CHC, CHPC, CHRC, and Terence Ou

Healthcare organizations, large and small, contract with physicians to provide myriad services. Federal and state regulations—such as Stark Law and the Anti-Kickback Statute—govern how and how much organizations can legally compensate physicians. It is a compliance mandate to document commercial reasonableness (CR) and fair market value (FMV) for physician transactions.

Given the volume of arrangements at hospitals and the regulatory scrutiny they are subject to, it is essential to develop policies, procedures, and guidelines for determining and documenting CR and FMV. Defining a clear and easy-to-administer FMV process may be the most important step to improve workflow and physician contract compliance; however, striking a balance between simplicity and mitigating risk is both an art and a science. The following will help compliance and risk professionals think about structuring an FMV policy that works with your organization's market and operational realities—not against them.

Understanding your organization

Before creating or modifying procedures and policies, it is essential to do an analysis of the organization and market. A thorough understanding of dynamics will help craft a policy tailored to the organization's needs. Keep an open mind thinking through the factors that may influence the FMV process; previously unconsidered dynamics could influence how the policy functions (or, conversely, doesn't function).

As you undertake the analysis, consider the following:

1. **Size:** Larger facilities and health systems typically have more arrangements, so considerations for how many arrangements are completed annually will likely need to be made. A key question for health systems to consider is whether to centralize physician contract compliance in a corporate team or decentralize the process, giving affiliated facilities or departments more leeway to set and approve rates. A decentralized process will require education and empowerment of facility-level leaders to achieve consistent application of system payment rates, approvals, and documentation policies. If the function is centralized, fewer

people will be involved, but FMV determination and documentation could be most of their job scope. It also may be challenging to coordinate communication and approvals across many facilities. There is no "right" answer in terms of structure across a large system—only priorities and trade-offs.

2. **Complexity:** Generally, larger, more complex organizations—particularly trauma centers—have more contracts and often pay higher rates. This is vital for considering the FMV process as well as the resources needed to execute the policy.

3. **Medical staff/physician market:** How large and consolidated is the medical staff? If most physicians are employed by an affiliated group, the number and type of contracts will differ from an organization with many independent physicians and groups. Is there an adequate supply of physicians across specialties? Are there multiple groups for each specialty? Other market dynamics may influence physician transactions, such as shortages, high-cost living areas, recruitment challenges, and more.

4. **Hospital market:** Is the hospital market consolidated? Understanding other health systems in the market as well as the competitive landscape is significant context too.

This analysis won't drive the creation of policies more than compliance and legal best practices; rather, it is helpful to gain sufficient understanding of how outside forces may influence transactions.

Setting goals for FMV policies

Every FMV policy needs to meet overarching goals. Clearly, every FMV policy should strive to negotiate fair, compliant arrangements and follow federal and state regulations. Prioritizing additional goals—such as making the process efficient, making payments consistent, or lowering costs—is also imperative.

It is tempting to try to prioritize all these goals, but there are inherent trade-offs. Determining what goals the policy should achieve must involve key stakeholders. Consensus may take time and thoughtfulness to develop. Ranking priorities will help your organization determine if your process is structured in a way that yields the intended results.

For many organizations, *mitigating risk* is their highest priority. These risk-averse organizations may prioritize cost or timeliness less. Organizations prioritizing minimizing risk may have additional steps or safeguards that others find unnecessary. Some examples of this could be using more than two market surveys, valuations for most, if not all, arrangements, and more people and steps involved in contract approvals.

Hospitals and health systems are being forced to do more with less, particularly as the labor market tightens and budgets continue to shrink. *Saving administrative time and creating efficiencies* is often a top priority for organizations. Efficiency for one organization may be inefficient for the other, so it may be necessary to experiment with different approaches and see what works.

Lowering costs, for many organizations, is another top priority. The FMV process need not be expensive—particularly if your organization has a mix of mostly straightforward arrangements. Most emergency department (ED) calls and medical directorships, as well as employment arrangements, can be documented using low-cost resources, such as market surveys.

Standardizing across your system may also be an organizational goal, particularly after a merger with another system or acquiring new facilities. Having inconsistent payments for the same service within your organization could be a compliance risk, so achieving consistency is critical. Some organizations without a consistent FMV policy find that, over time, payments to physicians are inconsistent across hospital services or facilities within a system. Lack of standardization can also be a compliance risk.

Given that most compliance teams juggle many other responsibilities, *reducing time spent* determining CR and FMV is a goal that warrants consideration. There are ways to design policies that reduce the amount of time the FMV process should take. A centralized source or technology can help standardize the policy and facilitate consistency. Once team members learn how to use a particular market survey or technology, they can complete their jobs faster. It will also be easier to review or audit documentation if it is uniform.

Resources for the FMV process

There are many options for resources that can be used to facilitate the FMV process. Many organizations use a market survey or surveys as their primary resource for the FMV process. Market data is essential to determining physician compensation for any valuation method, whether market method or cost method. Having access to a high-quality survey(s) helps organizations make informed decisions. Surveys are also cost-effective resources. Surveys commonly used in the FMV process include American Medical Group Association, ECG Management Consultants, Gallagher, MD Ranger, Medical Group Management Association, and Sullivan Cotter. With large samples for the major surveys, one is often sufficient, but a secondary source may be helpful if negotiations are challenging or data is sparse.

Organizations can leverage technology to their advantage. Most FMV policies include an internal approvals process going through multiple people or teams; technology products can facilitate consistency and communication and generate necessary documentation. While working with several valuation firms may be necessary, avoid "shopping" for opinions between consulting firms.

Most organizations use consulting firms for complex or challenging arrangements that need more than supporting market data. Sometimes, organizations partner with valuation firms and provide an overarching opinion, outlining FMV policies and guidelines on behalf of the organization. Other times, consulting firms will write an FMV opinion for each arrangement. Some organizations choose to have an opinion for each physician contract they negotiate. While there is no mandate to render an FMV opinion for every arrangement, risk-averse organizations may choose this route, despite the cost.

Setting payment thresholds and guardrails and special considerations

Setting payment thresholds within an organization's definition of FMV is a common practice to standardize payments and create compliance guardrails. Typical thresholds used in the FMV process are the median and 75th percentile. Choosing which percentile is best for the organization takes thoughtfulness and consideration of the potential consequences.

Policies that use the median as their upper guardrail typically consider payments below the median per benchmarks from one or more surveys FMV and hence can be documented with market data alone. Another common threshold—though not for all organizations—is the 75th percentile. There are different ways to set thresholds, depending on the organization's demographics, market, risk tolerance, and other factors. When considering what thresholds to use in an FMV policy, it's important to deliberate the most efficient and simple process while remaining compliant.

It's crucial to consider all the consequences of a given threshold—even unintended ones. For example, if an organization chooses a higher threshold like the 75th percentile but current rates are closer to the median, rates may creep up over time. On the flip side, if organizations set the median as the upper threshold but many arrangements must go up to the 75th percentile because of the market or other circumstances, the FMV process may take longer to collect the required information for exceptions. Typically, these situations require more time and staffing that an organization can handle unless it is large and has many resources.

Documentation methods and best practices

A key element of FMV policies is developing a standardized process to document that payment rates fall within an organization's rules. Organizations must define what specific documentation is needed, who compiles it, and where it will be stored. Consistent documentation makes auditing compliance much easier and more efficient. It also will make decision-making faster and more streamlined, particularly if using standardized reports for contract approvals. Documentation procedures will have an impact on the FMV policy and how efficient and compliant it is. Ease of documentation (or lack thereof) will impact the entire FMV process and team; balancing compliance with expediency and efficiency is vital. Like setting goals, documentation decisions may have trade-offs to consider.

What constitutes documentation? Here are options to consider:

1. A copy of relevant market data
2. Memo or standardized form with all necessary requirements and approvals to prove payment is commercially reasonable and FMV
3. Automated report from technology/product used in the FMV process
4. Completed checklist
5. Valuation

Drafting a policy

After researching the market, understanding the organization's approach to risk, and determining the right FMV thresholds, it is time to draft a policy. While there is no one way to write an FMV policy, the specifics will vary based on how the organization's compliance and financial priorities are balanced.

It is helpful to include in the guideline's examples of specific transactions and how to address them. Employment, emergency call coverage, administrative, and hospital-based agreements each have different types of terms and benchmarks; providing examples will be a useful resource, particularly for new staff.

While policies may be different from organization to organization depending on risk tolerance, financial considerations, and more, these are must-haves for all FMV policies:

- Clear, simple guidelines and procedures to streamline physician agreements and mitigate risk
- Accountability and well-defined roles of the team members involved in the execution of the policy and contracts
- Step-by-step process for negotiation and approvals
- Consistent use of standardized, objective benchmarks
- Guidelines for dealing with outlying transactions
- Routine schedule for reviewing and monitoring all agreements
- Awareness of overall investment/financials
- Consistent documentation of commercial reasonableness and FMV

- Identification and monitoring of all high-risk arrangements and "stacking"

Consider the following sample policy:

1. All arrangements must have a complete job description with payments and services clearly outlined. All medical directorships must stipulate hours per month and maximum annual payments.
2. Commercial reasonableness assessment of both the proposed position and payment must be assessed and documented.
3. Identify all payment contracts with the party to determine risk of inappropriate stacking.
4. Compare contract payment terms to benchmarks:
    a. If at or below median benchmark for appropriate service, document rate to confirm FMV is complete.
    b. If payment is between the median and the 75th percentile, submit additional documentation for review/approval by senior executives (additional survey data, negotiation or payment history, extraordinary requirements, etc.).
    c. If payment is above the 75th percentile, submit an FMV opinion or, in certain situations, a detailed cost analysis and set of extraordinary circumstances.
5. All documentation must be signed by an authorized agent, filed with a signed copy of the agreement, and stored in the contract management system.

Implementation best practices

Because physician contracting involves many parts of the organization (legal, finance, strategy, compliance, etc.), all stakeholders should approve the final FMV policy and procedures. Start with approvals by all executive stakeholders before seeking approval at other levels of the organization. It is critical to involve people who manage contracts directly in their roles. If procedures are designed entirely by people who won't end up executing them, there may be elements of the policy that take too much time, are unrealistic, or simply not a good idea. Involving people at all stages and levels of the process will only make the policy better.

Consider approval by the board of directors, or at minimum, the compliance committee, when implementing major changes in contracting policies and physician compensation design. Organizations have varying degrees in which they involve the board of directors. Generally, organizations that involve their board closely in physician arrangements and compliance find that it creates organizational alignment and fosters good communication across stakeholders and business functions.

A policy has no purpose if it is not enforced. The goal of designing a simple yet effective FMV policy is to remove as many points of friction as possible, making the process simple to follow. Building "checkpoints" into the process can ensure that people are following through. An example of a checkpoint is having periodic reviews of physician contracts to ensure they comply with the policy. Sometimes these reviews aren't fast enough to spot potential issues. One solution is to use automated dashboards to ensure arrangements are being negotiated within the parameters of the policy. Having employees "champion" the policy and promote it amongst colleagues is one of the best enforcement strategies. These champions can coach physicians or other administrators in key contract terms and initial contract requirements.

Communicating the new policy needs to happen quickly, broadly, and frequently. Ensure that people can access

resources that are needed to execute the process, including technology, market data, and consultants. Instead of emailing the new policy to introduce it, consider holding a meeting in person or virtually. After the initial communication and subsequent training session(s), make sure the policy is easy to find. Including it on the organization's intranet or resource pages is imperative, as well as any shared spaces such as Slack or Microsoft Teams.

Regular monitoring and reporting on the effectiveness of the policies will promote transparency and compliance across the organization. Some organizations audit physician contracts annually; others choose to select a group of contracts and audit quarterly, spreading the process throughout the year. Regardless of what method works for the organization, set a schedule, and stick to it.

Takeaways

- Most healthcare organizations contract with physicians; it is a compliance mandate to document commercial reasonableness and fair market value (FMV) for physician transactions.
- Healthcare organizations must develop policies, procedures, and guidelines for determining and documenting commercial reasonableness and FMV.
- Before creating a policy, understand the business and physician relationship strategy to help draft a policy tailored to the organization's needs.
- Common goals for FMV policies include risk mitigation, saving administrative time, lowering costs, and standardizing both processes and physician payments.
- While FMV policies may have different structures and processes, all effective FMV policies include clear guidelines and procedures to streamline transactions and mitigate risk.