

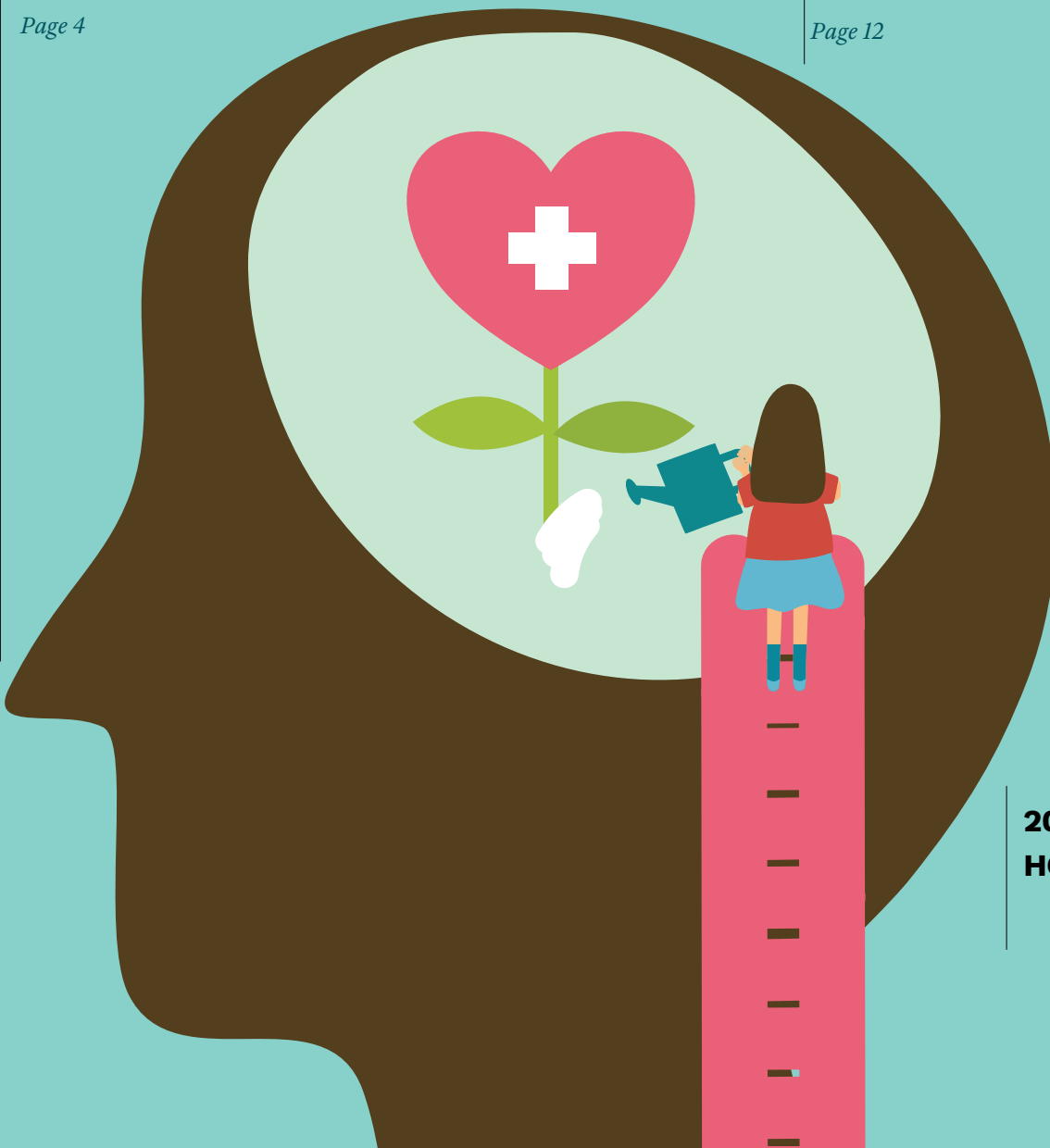
UNIQUE CHALLENGES FOR BEHAVIORAL HEALTH PROVIDERS

IN PROTECTING HEALTH CARE WORKERS WHILE BALANCING THE NEEDS OF PATIENTS

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OUTSIDE OR INSTITUTIONAL ACTIVITY? INTERNAL REVIEW AND COMPENSATION CONSIDERATIONS

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Outside or Institutional Activity? Internal Review and Compensation Considerations:

Four-Step Process for AMC Faculty Physician Review and AMC Policy and Procedure Considerations

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Academic medical centers (AMCs) provide health care services to communities, while also being leaders in education, research, and innovation. With such strong and competing priorities, financial pressures are high, and the organizational structures are incredibly complex. This complexity creates numerous challenges—including scrutiny of productivity and overall assessment of the faculty physician activity and corresponding compensation paid. A review of

faculty activities can be for faculty activities within the AMC (paid by the entities under the AMC institutional umbrella), and it can also be for activity outside the AMC. Depending on the organizational structure, the proposed faculty physician outside activity may require institutional approval; contracts may require review and approval; and, in some cases, the AMC may consider this to be activity of the institution, and contracts and revenue will impact the organization through an institutional contract.



Generally, an AMC recognizes the value of an active faculty participating in intellectual activities that are consistent with the faculty's obligations to the AMC.

This article examines the various policy and operational factors in considering this an institutional activity.

Faculty Physician Outside Activities and Interest

For the purposes of this article, a faculty physician outside activity or interest is an “external activity, relationship, or interest—whether paid or unpaid—related to a faculty physician’s work for or position in an AMC and its affiliated entities, that could result in a benefit to a faculty physician or their family.”⁷¹ Examples include, but are not limited to, consulting, ownership, or equity in an outside entity; speaking engagements, consulting, or advisory arrangements; and serving on boards of directors. Generally, an AMC recognizes the value of an active faculty participating in intellectual activities that are consistent with the faculty’s obligations to the AMC. AMC faculty physicians are often encouraged to pursue such endeavors for institutional and individual educational and research opportunities and prestige purposes. Typically, an AMC will have an outside activity or interest review process to consider conflicts of interest matters with AMC activities; assess the outside activity for any regulatory, fraud, and abuse concerns; and review the arrangement or contract for compliance with AMC policies and procedures. This latter analysis may include, but would not be limited to:

- ▶ Reviewing that an outside activity or interest does not interfere with or compromise the faculty physician’s primary obligation to the AMC;
- ▶ Assessing the planned compensation;
- ▶ Ensuring that no, or only incidental, resources of the AMC are used; and,

- ▶ Reviewing compliance with the AMC’s policies on noncompetition, publications, branding, use of logo, etc.

Institutional Activities

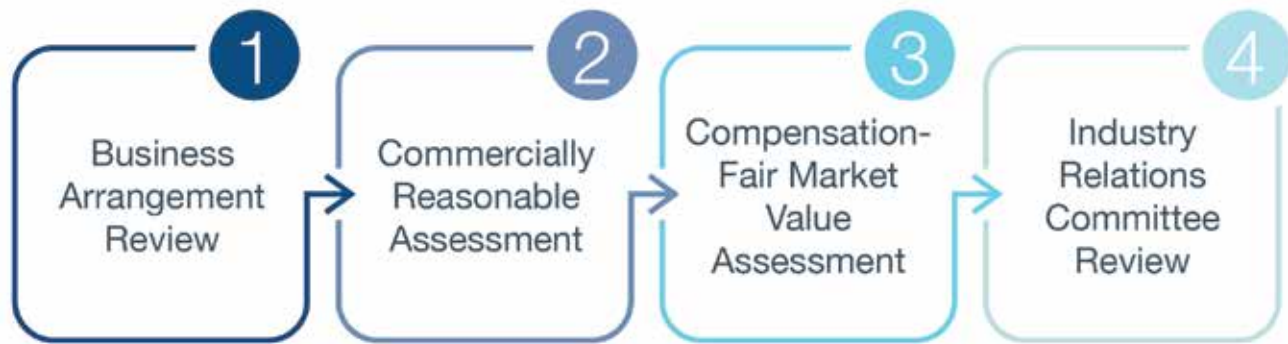
Outside activities require a faculty physician’s time, energy, and focus. In some cases, it may be in the best interest of the AMC and faculty physician for these activities to be considered internal, and therefore within the scope of duties and productivity of the faculty physician for the AMC organization. Activities may be considered internal for a variety of reasons. At a minimum:

- ▶ The faculty physician and AMC agree on this approach;
- ▶ The planned activity is closely aligned with the AMC’s mission;
- ▶ The economic analysis is acceptable; and,
- ▶ The institutional contract can be structured to meet the AMC’s policies and procedures.

There are also considerations when a faculty physician’s organizational responsibilities, productivity measures, or additional external salary support would benefit from increased institutional activity, and the faculty physician is also engaged in outside activity. In these cases, it may be appropriate to consider making the outside activity an institutional activity and for the commensurate revenue to be part of the AMC’s funds flow, faculty physician productivity assessment, external salary support, and compensation plan.

Identifying the outside activity and assessing it for an institutional arrangement can be managed through

Institutional Review Process



an existing approval process, which also considers conflicts of interest/commitment issues. Typically, these processes require the approval of the faculty physician's direct supervisor (e.g., department chair, division chief, etc.), and issues impacting the institution are considered in the process. If the activity is being considered as an institutional activity, it is also appropriate to consider the activity in determining AMC clinical, academic, and research compensation.

As previously noted, the organizational structures of AMCs are complex. Internal to the AMC, the faculty physician's compensation may be funded by the health system, the clinical department, the academic department, and/or the research department from which the faculty physician duties relate. These AMC functions may or may not be structured under one entity. Determining total "stacked" compensation across the AMC and its affiliates may be a challenge.

If the organization does enter into an institutional agreement for the outside activity, the AMC accepts legal risk for the transaction, including ensuring that the total stacked compensation paid to the faculty physician is fair market value (FMV) and commercially reasonable (CR). To the extent the compensation is paid directly to the faculty physician (an "individual agreement"), while the AMC may not be required to ensure that the compensation received by the faculty physician for the outside activity is FMV and CR, it is still a consideration for the AMC.

Institutional Review Process

An AMC may complete the outside activities' institutional review process in four general steps as outlined in the diagram above.

Part 1—Business Arrangement Review

The Business Arrangement Review is the first part of the four-part process and should be completed by the office(s) responsible for development and approval of the business arrangement. The central questions surrounding this review include the "what, why, and how" of the arrangement. Specifically, the following questions should be answered and documented:

- ▶ What is the scope of the contract and services under consideration?
 - Does the proposed arrangement advance or support the mission(s) of the organization?
- ▶ Why is the organization entering the agreement?
 - How does the activity support the faculty and/or mission(s) of the organization?
- ▶ How is the proposed arrangement structured?

Part 2 and 3—CR and FMV Compensation Assessments

Total stacked (i.e., all inclusive) compensation should be FMV and CR for the services a faculty physician personally performs. While the details of determining

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It is important for AMCs to use an institutional approach to guide the assessment of such outside activities and mitigate organization and individual risk.

clinical, academic, and administrative compensation are outside the scope of this article, we will focus on FMV compensation and CR considerations for outside services.

The central concept surrounding CR is to answer the “why” of the arrangement. CR is most clearly defined by the Centers for Medicare & Medicaid Services (CMS) in Stark Law commentary, which states that “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 faculty physician (or family member or group practice) of similar scope and specialty, even if there were no potential designated health services (DHS) referrals.”²

To assess the CR of an arrangement, each analysis should include an understanding of the specific transaction’s:

- ▶ **Business purpose**, including an assessment of whether the arrangement fits the AMC’s mission.
- ▶ **Services provider**, including an assessment of whether the provider has the necessary skills to perform the duties of the arrangement.
- ▶ **Appropriateness for the health care provider’s facility and population**, including an assessment of the legitimate business need for the organization to enter the arrangement.

▶ **Suitability**, including an assessment of the human and capital resources required for the success of the arrangement and overall resources and investments made in the particular service line or by the health care entity.

▶ **Aptness of independence and oversight**, including an assessment of how often the arrangement will be reviewed for compliance.³

The central question surrounding the determination of FMV is *how much*? Determining the FMV of any faculty physician compensation arrangement includes assessing quantitative and qualitative factors based on the individual facts and circumstances of the arrangement. Documentation of the assessment is necessary to provide evidence of the conclusions regarding FMV and CR and will help an AMC more thoroughly determine the totality of the compensation paid to a faculty physician to mitigate risks.

While helpful in providing a foundation and direction for proceeding, benchmark survey data does not alone determine the FMV for faculty physician services. Further, other than the Open Payments Program (OPP),⁴ data for outside services is not easily accessible or readily available. While approaches for determining FMV will vary among valuers, the definition of FMV is standard: the price at which the property or service would change hands between a willing buyer and a willing seller, neither being under a compulsion to buy or sell and both having reasonable knowledge of the relevant facts.⁵



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4-Step Institutional Review Process Detail



This definition is consistent with the Stark Law definitions of FMV and general market value, summarized as follows:

- FMV:** The value in arm’s-length transactions, consistent with the general market value.
- General Market Value:** The price that an asset would bring as the result of bona fide bargaining between well-informed buyers and sellers who are not otherwise in a position to generate business for the other party, or 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, on the date of acquisition of the asset or at the time of the service agreement. Usually, the fair market price is the price at which bona fide sales have been consummated for assets of like type, quality, and quantity in a

particular market at the time of acquisition, or the compensation that has been included in bona fide service agreements with comparable terms at the time of the agreement, where the price or compensation has not been determined in any manner that takes into account the volume or value of anticipated or actual referrals.⁶

To determine FMV for outside activities in an institutional arrangement, the valuator will seek to answer the following questions:

- What are the terms of the proposed arrangement?** An understanding of the terms should include who is doing what, for how long, where, and the amount of proposed compensation.
- Does the nature of the services require specialized expertise?** The likely answer to this question is “yes,” as outside services organizations seek leaders in their specialty. However, the valuator should be

careful to ensure that the specialty is required in order for the duties to be performed. For example, a neurosurgeon providing services that a family medicine faculty physician could perform should be compensated at family medicine faculty physician rates.

- ▶ How rare is the required expertise?
- Will the service lead to regional, national, or international acclaim or recognition for the faculty physician?
- Will the service lead to regional, national, or international acclaim or recognition for the AMC?
- ▶ Will the services be personally performed by the faculty physician?
- ▶ Is the value of the service not based on the volume or value of referrals to the hospital provider or another entity?
- ▶ Is the outside activity considered an innovation?
- ▶ Are there similar services provided by others within the organization? What is the compensation for those activities?
- ▶ What does the OPP include as compensation for similar services?
- ▶ What is the number of hours and/or level of effort required by the faculty physician to provide the services?
- ▶ Is the goal difficult or simple to achieve?
- ▶ What is the replacement cost? For example, what is the cost for the AMC to replace the faculty physician who is otherwise consulting under another arrangement?
- ▶ Should considerations be made for incremental institutional administrative costs? Particular consideration for this issue may be necessary if the form of the contract (e.g. an institutional contract) substantially increases the cost consideration in meeting the terms of the contract.

Part 4—Industry Relations Committee Review

The fourth step involves a review by the Industry Relations Committee, which is responsible for the overall process and proposed final arrangement. The central theme of this review is *process*. Specifically, this review should answer three main questions:

- ▶ Does the overall arrangement seem reasonable? The Committee should consider the entirety of facts and circumstances and whether the arrangement seems reasonable considering professional judgment.
- ▶ Was the appropriate process followed? The process should provide a reasonable framework from which to assess institutional arrangements. Deviations from the process should be explored and understood. While exceptions may occur, the related risk may need mitigation.
- ▶ Is the appropriate process complete? A final decision on any arrangement should not be made until the process is complete and the Industry Relations Committee is convinced of the gathered evidence.

Building the Institutional Review Policy and Procedure

Policy Development

A policy can provide helpful guidance to individuals within the organization and to the Industry Relations Committee. It is important for AMCs to use an institutional approach to guide the assessment of such outside activities and mitigate organization and individual risk. While many AMCs have such a policy,⁷ it often simply defines what an outside activity is, but may not specifically address how the outside activity could be considered an institutional activity or how it is addressed from either a contractual or compensation perspective. The policy, when used in conjunction with the four-step process described earlier, should answer the additional following questions:

- ▶ Does the policy outline resources to be provided by the AMC for monitoring, reviewing, and



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administering institutional arrangements? For example, the AMC may provide legal and administrative services, in addition to space, supplies, and other resources.

- ▶ What institutional considerations need to be given for unrelated business income tax (UBIT) implications resulting from the outside service?
- ▶ Who is responsible for negotiating, reviewing, and reporting on the activity?
- ▶ Are the primary missions/activities of the AMC being met by the faculty physician?
- ▶ Will there be intellectual property generated as part of the outside activity, and if yes, how will this be handled?
- ▶ How will funds flow be handled?
- ▶ What is the impact on the faculty practice plan or department compensation plan?
- ▶ How will the activity impact faculty physician productivity or required external salary support?
- ▶ Is the decision to include the outside activity as an institutional activity a joint decision of the organization and faculty physician, or does the organization have primacy of the decision as the employer of the faculty physician member?

Procedure Development

As mentioned earlier, there are many reasons an organization or a faculty physician may want an outside activity to be considered an institutional internal activity. To begin the process, the faculty physician would need to disclose the potential activity to the organization, generally to the faculty physician's direct supervisor. This is an appropriate first level of review. The direct supervisor, often the department chair or division chief, is in the best position to assess the following:

The proposed activity's fit within the institution;

- ▶ Organizational priorities and use of institutional resources;
- ▶ Time and effort of the faculty physician and priorities that compete for the faculty physician's attention, including caring for patients, teaching, performing research, publishing scholarly activity, serving on institutional committees, and supporting organization activities;

- ▶ The faculty physician's ability to meet primary commitment to and needs of the organization; and
- ▶ Impact on the compensation of the faculty physician and benefit of having the activity considered as part of the compensation plan and activity measures.

Following approval by the direct supervisor, the proposed activity can be advanced to the Institutional Review Committee for review and approval.

If the activity is approved by the organization as an internal activity, it makes most sense for the compensation to be processed through appropriate funds flow processes as any other revenue to the organization would be considered. In this case, the compensation should also be considered as part of the faculty member's productivity in meeting the benchmark for any appropriate category of activity (e.g., patient care, research, education) and/or for any goals for external funding and salary support.

Conclusion

The complexity of an AMC's mission and organizational structure creates numerous challenges when it comes to evaluating faculty physician activity, productivity, and corresponding compensation. By deploying the four-step institutional process, an AMC has a means by which to consider, analyze, and document important decision-making surrounding outside activity within an institutional arrangement. Working through this process, an AMC will have increased knowledge and ability to consider outside activities of the faculty as institutional activities of the faculty physicians.

1. Organizations may use different definitions for "outside activity or interest." The definition above is a sample definition used for purposes of this article.
2. 69 Fed. Reg. 16093 (Mar. 26, 2004).
3. PYA, P.C.—*Commercial Reasonableness: Defining Practical Concepts and Determining Compliance in Healthcare Transactions for Physician Services*, <https://www.pyapc.com/wp-content/uploads/2019/06/Commercial-Reasonableness-Defining-Practical-Concepts-and-Determining-Compliance-in-Healthcare-Transactions-for-Physician-Services-061119.pdf>.
4. See <https://openpaymentsdata.cms.gov/>.
5. Treas. Reg. § 20.2031-1(b) (2005); Rev. Rul. 59-60, 1959-1 C.B.237.
6. 42 C.F.R. § 411.351 (2011).
7. Rebecca Schaefer, *Lurking Legal Issues for AMCs in Faculty-Led Consulting for Industry via Institutional Contracts*, AHLA CONNECTIONS (May 2019).