

## Fair Market Value of Hospice Medical Director Compensation

The Centers for Medicare and Medicaid Services (“CMS”) made three hospice-focused announcements during July of 2023 indicating the agency is focusing heavily on investigating and preventing hospice fraud and abuse. The government is exercising more oversight over hospice ownership<sup>i,ii</sup> and physician medical directors<sup>iii</sup> who certify the need for hospice services to address growing fraud reports in the hospice industry.

Hospice patients are a vulnerable population. CMS and the Department of Justice (“DOJ”) place special emphasis on protecting vulnerable patients. A dozen hospice agencies have entered into Corporate Integrity Agreements (“CIAs”) with the Office of the Inspector General of the Department of Health and Human Services to avoid exclusion from participation in federal healthcare programs since 2015.<sup>iv</sup> The DOJ has negotiated 40 hospice-related settlements since 2012 totaling \$266.5 million.<sup>v</sup> The DOJ has also brought many cases against hospice operators for physician kickbacks during the same period.<sup>vi</sup> Kickbacks are a central feature of many hospice investigations.

- Merida Group
  - 4/21/2021: Operations manager Jose Garza was sentenced to 27 months in prison for his role in a kickback conspiracy. At trial witnesses testified that physicians were bribed with illegal kickbacks, under the guise of medical directorships, to falsely certify unqualified patients for hospice services.<sup>vii</sup>
  - 2/3/2021: Hospice CEO Henry McInnis was sentenced to serve 15 years in prison for his role in the kickback conspiracy. McInnis adopted a policy that paid illegal kickbacks in the form of bribes to physicians under the guise of medical directorships, to falsely certify unqualified patients for hospice and home health.<sup>viii</sup>
  - 12/16/2020: Owner Rodney Mesquias was sentenced to serve 20 years in prison and pay \$120 million for his role in a hospice kickback conspiracy.<sup>ix</sup>
- Allstate Hospice and Verge Home Care
  - 1/19/2021: Founders Onder Ari, Sedat Necipoglu, and their companies paid \$1.8 million to resolve allegations they allegedly made improper payments to physicians for referrals. According to the DOJ, they provided monthly medical director payments to multiple physicians who were the main source of their referrals, and the medical director payments were in excess of fair market value for the services the physicians actually provided.<sup>x,xi</sup>

- Compassionate Care Hospice Group
  - 7/6/2017: Compassionate Care Hospice Group, Inc., (“CCH Group”) agreed to pay \$2.4 million to resolve allegations that CCH Group and its subsidiary Compassionate Care Hospice of Atlanta, LLC, submitted or caused the submission of false claims to Medicare and Medicaid by engaging in improper financial relationships with contracted physicians.

### Medicare’s 2024 Hospice Proposed Rule

Medicare’s 2024 Hospice Payment Rate Update Proposed Rule includes a new provision intended to strengthen program integrity.<sup>1</sup> The 2024 Hospice Proposed Rule proposes to require all physicians who order or certify hospice services for Medicare beneficiaries also be enrolled in Medicare or validly opt out.<sup>xii</sup> All Medicare-covered hospice services must be ordered and certified by medical physicians. Medicare has limited ability to verify whether unenrolled physicians are qualified or have adverse histories. Medicare believes that closer vetting of physician status, such as licensure, will prevent some fraud and abuse.

### Fair Market Value of Hospice Medical Director Compensation

Hospice physician medical directors are the gatekeepers between Medicare hospice reimbursement and bad actors. Kickbacks are a key focus of many criminal cases brought by the DOJ against hospice operators and hospice medical directors.<sup>vi</sup> A third-party opinion validating the Fair Market Value of hospice medical director compensation is a defense against fraud and abuse allegations and investigations.

Unlike home health agencies, hospices are required to have a medical director under Medicare’s Hospice Conditions of Participation<sup>xiii</sup> and Medicare’s Hospice Provider Billing Manual. The need for hospice care must be certified by the hospice medical director for every hospice patient, and the medical director may be identified as a hospice patient’s attending physician.

*To be covered, hospice services must be reasonable and necessary for the palliation or management of the terminal illness and related conditions. The individual must elect hospice care and a certification that the individual is terminally ill must be completed by*

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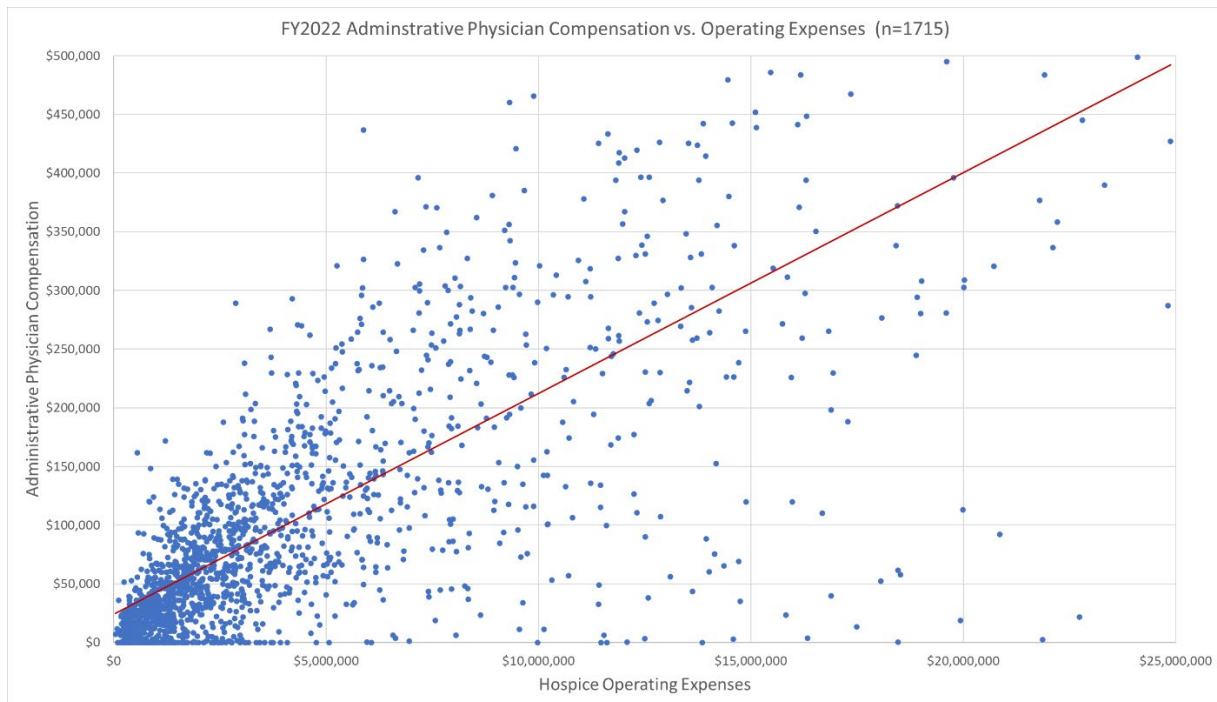
<sup>1</sup> <https://www.cms.gov/newsroom/fact-sheets/fiscal-year-fy-2024-hospice-payment-rate-update-proposed-rule-cms-1787-p>

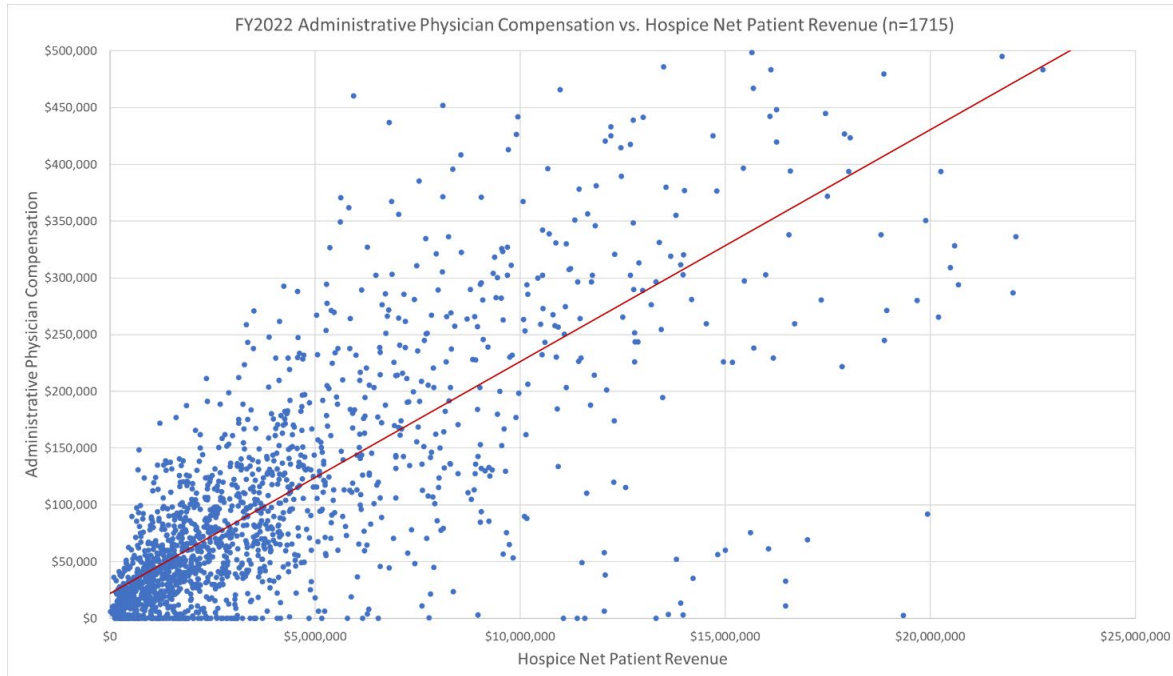
the patient's attending physician (if there is one), and the Medical Director (or the physician member of the Interdisciplinary Group (IDG)).<sup>xiv</sup>

*Payment for physicians' administrative and general supervisory activities is included in the hospice payment rates. These activities include participating in the establishment, review and updating of plans of care, supervising care and services and establishing governing policies.<sup>xv</sup>*

Hospice medical directors provide a vital service. Hospice medical director payment arrangements can be validated with market data and defended by adherence to the Stark exceptions and Anti-Kickback safe harbors for professional service agreements.

Market data on hospice medical director compensation illustrates the relationship of physician compensation and overall hospice agency size in terms of operating expenses and revenues.





Hourly hospice and palliative care compensation rates are readily available from market surveys and databases. Fair market value analyses should validate both hourly medical director rates for the hospice and palliative care physicians, as well as the overall medical director compensation trends for hospice agencies of similar size. These two factors, fair market value compensation and the commercial reasonableness of the overall compensation arrangement, can be used to fulfill some requirements of the Stark exceptions and Anti-Kickback safe harbors. Hospice agencies should consult their legal counsel to ensure their medical directorships fulfill all requirements of the Stark exceptions and Anti-Kickback Statute safe harbors.

LBMC has helped several hospice agencies develop compliant compensation models for their various medical directors. Fair market value analysis considers agency size and type, the scope of the medical director's duties and responsibilities, and the specialty and training of the medical director. Hospice agencies can contact LBMC for fair market value and commercial reasonableness opinions to mitigate the risk of being implicated in fraud and abuse investigations.

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- <sup>i</sup> <https://www.cms.gov/files/document/mln7867599-period-enhanced-oversight-new-hospices-arizona-california-nevada-texas.pdf>
- <sup>ii</sup> <https://www.cms.gov/newsroom/fact-sheets/calendar-year-cy-2024-home-health-prospective-payment-system-proposed-rule-cms-1780-p>
- <sup>iii</sup> <https://www.cms.gov/newsroom/fact-sheets/fiscal-year-fy-2024-hospice-payment-rate-update-proposed-rule-cms-1787-p>
- <sup>iv</sup> <https://oig.hhs.gov/compliance/corporate-integrity-agreements/cia-documents.asp>
- <sup>v</sup> <https://fraudinhhealthcare.com/results/?entity%5B%5D=301>
- <sup>vi</sup> <https://www.justice.gov/opa/pr/two-arrested-los-angeles-their-roles-hospice-fraud-conspiracy>, <https://www.justice.gov/opa/pr/manager-hospice-and-home-health-companies-sentenced-prison-role-150-million-health-care-fraud>, <https://www.justice.gov/opa/pr/hospice-administrator-sentenced-role-hospice-fraud-scheme>, <https://www.justice.gov/opa/pr/owner-texas-chain-hospice-companies-sentenced-150-million-health-care-fraud-and-money>
- <sup>vii</sup> <https://www.justice.gov/opa/pr/manager-hospice-and-home-health-companies-sentenced-prison-role-150-million-health-care-fraud>
- <sup>viii</sup> <https://www.justice.gov/opa/pr/ceo-sentenced-150-million-health-care-fraud-and-money-laundering-scheme>
- <sup>ix</sup> <https://www.justice.gov/opa/pr/owner-texas-chain-hospice-companies-sentenced-150-million-health-care-fraud-and-money>
- <sup>x</sup> <https://www.justice.gov/usao-sdtx/pr/hospice-home-health-agency-and-owners-pay-over-18m-resolve-claims-concerning-physician>
- <sup>xi</sup> <https://hospicenews.com/2021/01/20/allstate-hospice-founders-settle-fraud-case-for-1-8-million/>
- <sup>xii</sup> Section E (1). <https://www.federalregister.gov/documents/2023/04/04/2023-06769/medicare-program-fy-2024-hospice-wage-index-and-payment-rate-update-hospice-conditions-of> Section E (3). <https://www.federalregister.gov/documents/2023/04/04/2023-06769/medicare-program-fy-2024-hospice-wage-index-and-payment-rate-update-hospice-conditions-of>
- <sup>xiii</sup> <https://www.federalregister.gov/documents/2008/06/05/08-1305/medicare-and-medicaid-programs-hospice-conditions-of-participation>
- <sup>xiv</sup> Medicare Claims Processing Manual. Chapter 11 – Processing Hospice Claims. Section 10. Overview. <https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/clm104c11.pdf>
- <sup>xv</sup> Medicare Claims Processing Manual. Chapter 11 – Processing Hospice Claims. Section 40.1.1 Administrative Activities.