



Origination:	07/2020
Effective:	10/2021
Last Reviewed:	10/2021
Last Revised:	10/2021
Next Review:	10/2023
Sponsor:	Brian Kozik: SVP, COMPLIANCE & PRIVACY
Section:	GA-Corporate Compliance
Manuals:	Compliance

## GA-004-410 Fair Market Value and Commercial Reasonableness

### I. Purpose

The purpose of this Policy is to ensure that any Broward Health Referral Source Arrangement provides for Remuneration which is consistent with Fair Market Value, is Commercially Reasonable, and is not determined in a manner that Takes Into Account the Volume or Value of Referrals, in order to comply with applicable state and federal laws and regulations, including, without limitation, the Stark Law, 42 U.S.C. § 1395nn, the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, and the Florida Patient Brokering Act, Fla. Stat. § 817.505 (collectively, the "Self-Referral Laws").

(This Policy applies to all Broward Health Arrangements with a Referral Source (as the term Referral Source is defined in this Policy).

### II. Key Terms

For purposes of this Policy, the below terms shall have the meanings set forth below wherever they appear in this Policy, regardless of whether they are capitalized, unless:

1. The context in which they are used clearly requires a different meaning; or
2. A different definition is prescribed for a particular section of this Policy.

Words not defined shall be given their common and ordinary meaning unless the context in which they are used requires otherwise.

**Arrangement:** Any business or other relationship between Broward Health and another person or entity.

**Broward Health:** All entities, subsidiaries, and affiliates wholly owned or operated by the North Broward Hospital District ("Broward Health") including, without limitation, Broward Health's regions, hospitals, facilities, departments, divisions, and not-for-profit corporations.

**Commercial Reasonableness or Commercially Reasonable:** The particular lawful arrangement furthers a legitimate business purpose of the parties to the arrangement and is sensible, considering the characteristics of the parties, including their size, type, scope, and specialty. An arrangement may be Commercially Reasonable even if it does not result in profit for one or more of the parties.

**Contracts Management System:** Broward Health's electronic contracting system that serves as the centralized repository for all Broward Health contract and which contains all contract reviews, approvals, and supporting documentation.

**Designated Health Services or DHS:** Means any of the following services:

- (i) Clinical laboratory services;
- (ii) Physical therapy, occupational therapy, and outpatient speech-language pathology services;

- (iii) Radiology and certain other imaging services;
- (iv) Radiation therapy services and supplies;
- (v) Durable medical equipment and supplies;
- (vi) Parenteral and enteral nutrients, equipment, and supplies;
- (vii) Prosthetics, orthotics, and prosthetic devices and supplies;
- (viii) Home health services;
- (ix) Outpatient prescription drugs; and
- (x) Inpatient and outpatient hospital services.

**Fair Market Value or FMV:** means:

- (1) General. The value in an arm's-length transaction, consistent with the General Market Value of the subject transaction.
- (2) Rental of Equipment. With respect to the rental of equipment, the value in an arm's-length transaction of rental property for general commercial purposes (not taking into account its intended use), consistent with the General Market Value of the subject transaction.
- (3) Rental of Office Space. With respect to the rental of office space, the value in an arm's-length transaction of rental property for general commercial purposes (not taking into account its intended use), without adjustment to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor where the lessor is a potential source of patient referrals to the lessee, and consistent with the General Market Value of the subject transaction.

**General Market Value:** means:

- (1) Assets. With respect to the purchase of an asset, the price that an asset would bring on the date of acquisition of the asset as the result of bona fide bargaining between a well-informed buyer and seller that are not otherwise in a position to generate business for each other.
- (2) Compensation. With respect to compensation for services, the compensation that would be paid at the time the parties enter into the service arrangement as the result of bona fide bargaining between well-informed parties that are not otherwise in a position to generate business for each other.
- (3) Rental of Equipment or Office Space. With respect to the rental of equipment or the rental of office space, the price that rental property would bring at the time the parties enter into the rental arrangement as the result of bona fide bargaining between a well-informed lessor and lessee that are not otherwise in a position to generate business for each other.

**Immediate Family Member:** Husband or wife; birth or adoptive parent, child, or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild; and spouse of a grandparent or grandchild.

**Physician:** A duly licensed doctor of medicine or osteopathy, doctor of dental surgery or dental medicine, doctor of podiatric medicine, doctor of optometry, or any entity other than publicly traded entities which is wholly or partially owned by a Physician. A physician and the professional entity to which he or she belongs (e.g., a sole practice, physician group, etc.) are the same for purposes of this Policy.

**Referral Source:** A physician or physician's immediate family member or person, or entity that is an actual source or recipient of healthcare business or referrals to or from Broward Health.

**Referral Source Arrangement:** Every Arrangement that is between Broward Health and a Referral Source

**Remuneration:** Anything of value, including, but not limited to, cash, items, or services.

**Take Into Account the Volume or Value of Referrals:**

For Referral Source Arrangements other than Arrangements with Physicians, Remuneration "takes

into account" the volume or value of referrals if the formula used to calculate Remuneration includes referrals as a variable, resulting in an increase or decrease in Remuneration that positively correlates with the number or value of referrals by the person or entity receiving Remuneration.

For Remuneration paid to a Physician (or Immediate Family Member of the Physician), Remuneration "takes into account" the volume or value of referrals only if the formula used to calculate the Physician's (or Immediate Family Member's) Remuneration includes the Physician's DHS referrals to the entity as a variable, resulting in an increase or decrease in the Physician's (or Immediate Family Member's) Remuneration that positively correlates with the number or value of the Physician's referrals.

For rent or other Remuneration paid by a Physician (or Immediate Family Member of the Physician), such Remuneration "takes into account" the volume or value of referrals only if the formula used to calculate the Remuneration includes the Physician's DHS referrals as a variable, resulting in an increase or decrease in the payment amount that negatively correlates with the number or value of the Physician's DHS referrals to the entity receiving such payment.

### **III. Policy**

All Referral Source Arrangements must: (i) be consistent with Fair Market Value to the extent any items, services, or other Remuneration is exchanged between Broward Health and the Referral Source; (ii) be Commercially Reasonable; and (iii) not Take Into Account the Volume or Value of Referrals between the parties. Further, any such Arrangement must be accompanied by documentation supporting its Fair Market Value and Commercial Reasonableness.

### **IV. Requirements**

- A. **Prior to Execution.** Prior to executing any Referral Source Arrangement, Broward Health must ensure the: Arrangement is Commercially Reasonable and that any Remuneration provided therein is consistent with Fair Market Value for the items or services acquired or sold in such Arrangement, by documenting the Fair Market Value and Commercial Reasonableness of the Arrangement. The supporting documentation—Commercial Reasonableness Documentation (Section B below) and the FMV Documentation (Section C below)—shall be made part of the applicable Arrangement's file in Broward Health's Contracts Management System.
- B. **Commercial Reasonableness Documentation.** Documentation supporting the Commercial Reasonableness of an Arrangement may be in the form of a completed questionnaire, an explanatory memorandum, an independent third-party report, and/or other written correspondence (or a combination thereof). Such documentation shall evidence, with facts specific to the Arrangement in question, that the Arrangement furthers a legitimate business purpose of the parties to the arrangement and is sensible, considering the characteristics of the parties, including their size, type, scope, and specialty.
- C. **FMV Documentation.** Documentation supporting that the that the Remuneration provided for in an Arrangement is consistent with Fair Market Value may be in the form of the following:
  1. **Purchased FMV Software or Tools.** The Fair Market Value of a given Arrangement may be documented through the use of a Broward Health approved third-party software or platform, such as an online FMV calculator or other specialized product utilized to provide information pertaining to Fair Market Value.
  2. **Third-Party Report.** The Fair Market Value of a given Arrangement may be documented by obtaining a report from a Broward Health approved independent third-party appraisal firm with knowledge of the healthcare rules and regulations impacting the Arrangement.

3. Proper Procurement Procedures. In instances where Arrangements with Referral Sources are not with a Physician or a Physician's Immediate Family Member, or do not otherwise implicate the Stark Law, the Fair Market Value of any Remuneration in the given Arrangement may be documented by reference to a number of quotes, or other data or documents, which demonstrate the Arrangement has been procured through proper procurement channels, in accordance with Broward Health's Master Procurement Code, and is the "going rate" for the provision of the same or similar services or goods provided in the community. The following categories of Arrangements with a Referral Source shall always require documentation via Purchased FMV Software or Tools or a Third-Party Report as detailed above:
  - a. Arrangements with a Physician or an Immediate Family Member;
  - b. Arrangements that implicate 42 U.S.C. § 1395nn (aka the Stark Law); and
  - c. Arrangements that due to legal or compliance-related reasons necessitate such documentation as determined by the Office of the General Counsel and/or the Compliance and Ethics Department.
- D. Obtaining FMV & Commercial Reasonableness Documentation. The Broward Health department, division, region, facility, or other entity requesting an Arrangement must work with the Office of the General Counsel to obtain and/or provide the Commercial Reasonableness and FMV Documentation. The Office of the General Counsel, and/or its designee, shall be responsible for overseeing the process to obtain the FMV & Commercial Reasonableness documentation.
  1. Validity of Documentation. The Commercial Reasonableness and FMV Documentation must be current and valid as of the time an Arrangement is being entered into. That is, the documentation must evidence that an Arrangement is Commercially Reasonable and that any Remuneration therein is consistent with FMV at the time the Arrangement is being entered into. Any question as to the sufficiency of such documentation shall be resolved by the Office of the General Counsel in consultation with the Corporate Compliance and Ethics Department.
  2. Comprehensive. The FMV & Commercial Reasonableness Documentation must support, with as much specificity as practical, the items and/or services contemplated in the subject Arrangement. Where possible and applicable, survey and/or benchmark data shall reflect arrangements comparable in character, nature, and value to the Arrangement being evaluated.
  3. Qualifications & Selection of a Third-Party Appraiser. To the extent an independent third-party appraiser or valuator is utilized in connection with the valuation of an Arrangement, such third-party appraiser or valuator must be a reputable independent third party with experience in the healthcare industry, the subject matter of a given Arrangement, and the healthcare rules and regulations impacting the given Arrangement.
- E. Rental Agreements. In addition to the definition of Fair Market Value provided above, rental agreements between Broward Health and any Referral Source shall not take into consideration the intended use of the property or the convenience or proximity of the property to the lessor and/or potential Referral Source in the rental payment amount.
- F. Equipment. Where a Referral Source provides the equipment (a technical service) as well as professional services pursuant to a personal services agreement, the values of both the professional services and the equipment should be separately supported by the FMV & Commercial Reasonableness documentation.
- G. Medical Practices. When acquiring or divesting a medical practice or medical practice assets of a Referral Source, the FMV & Commercial Reasonableness documentation must evaluate the value of

the medical practice's assets as of the time of closing using recognized valuation methodologies and reasonable economic and market assumptions.

- H. **Maximum Compensation.** All Physician contracts shall have a maximum and capped total compensation. Exceptions to this can only be made with the written approval of the Office of the General Counsel and the Corporate Compliance and Ethics Department.
- I. **Changes to Fair Market Value or Commercial Reasonableness.** To the extent it is discovered during the term of a Referral Source Arrangement that the Remuneration exchanged between Broward Health and the Referral Source is no longer consistent with Fair Market Value or Commercially Reasonable, Broward Health may, in its sole discretion: (i) automatically adjust the compensation and/or Remuneration to ensure consistency with Fair Market Value and Commercial Reasonableness, as approved by the Office of the General Counsel and Corporate Compliance and Ethics Department, or (ii) take any other measures appropriate under the respective contract inclusive of, without limitation, termination of the Arrangement.

#### V. **Review**

- A. **Review by Contract Owner/Internal Stakeholder:** The Broward Health person requesting the Arrangement will review and confirm that the proposed compensation is supported by the FMV & Commercial Reasonableness Documentation and that such is documented in the Contracts Management System.
- B. **Review by General Counsel's Office:** The Office of the General Counsel will review the proposed Arrangement and the FMV & Commercial Reasonableness Documentation for compliance with legal and regulatory requirements.
- C. **Review by Corporate Compliance and Ethics:** The Corporate Compliance and Ethics Department will review the proposed Arrangement and the FMV & Commercial Reasonableness documentation to ensure that the proposed Arrangement complies with the Compliance and Ethics Program.

#### VI. **VI.Enforcement**

All Workforce Members whose responsibilities are affected by this Policy are expected to be familiar with the basic procedures and responsibilities created by this Policy. Failure to comply with this Policy will be subject to appropriate remedial and/or disciplinary action, up to and including termination of any employment or other relationship, in accordance with the Enforcement and Discipline Policy, Policy No. GA-004-238.

#### VII. **Document Retention**

Broward Health will retain a copy of all documents relating to this Policy for at least seven (7) years after their creation unless otherwise required to be retained for a longer period as provided under state or federal law or a particular Arrangement's contractual terms. Documents are considered a public record under Chapter 119, Florida Statutes and may be subject to disclosure, unless otherwise exempt under Florida law.

#### VIII. **Exceptions**

The following categories of Arrangements types are exempt from the FMV documentation requirement set forth in Section IV.C. of this policy:

- A. Contracts with Health Plans and Managed Care Organizations;
- B. Grants and Grant Applications;
- C. Contracts with local, state and federal agencies, and subdivisions;
- D. Contracts with non-governmental entities where the rates are standardized or set by local, state or

- federal government (e.g., pass-throughs; clinical trials funded by the National Institute of Health);
  - E. The Group Purchasing Organization ("GPO") contract;
  - F. Contracts/orders procured through a GPO contract;
  - G. Non-GPO Supply Chain Agreements;
  - H. Graduate Medical Education Program Letters of Agreement and Affiliation Agreements (for residency rotations);
  - I. Non-monetary agreements required under state or federal law or by accrediting agencies (e.g., Transfer Agreements between hospitals);
  - J. Request for Proposal Submissions (where Broward Health is submitting a bid);
  - K. Non-Disclosure & Confidentiality Agreements;
  - L. Non-Binding Letters of Intent; and
- Any other exceptions to this Policy shall be made only upon the agreement of the Office of the General Counsel in consultation with the Corporate Compliance and Ethics Department. This last exception shall be documented in a written memorandum that is included in the Contract Management System.

**IX. Interpretations**

The Corporate Compliance and Ethics Department will monitor Broward Health's adherence to this Policy. Administration and Interpretation of this Policy is the responsibility of the Corporate Compliance and Ethics Department and the Office of the General Counsel. If at any time changes are made to the Self-Referral Laws, or any of the terms defined therein, the interpretation of this policy will be adjusted as necessary to ensure compliance with such changes.

**X. Related Policies**

[GA-004-441 Physician Financial Arrangement Review, Approval, Tracking and Monitoring](#)  
[GA-004-238 Enforcement and Discipline](#)

**XI. References**

Stark Law, 42 U.S.C. § 1395nn, and implementing regulations  
 Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), and implementing regulations  
 Florida Patient Brokering Act, Fla. Stat. § 817.505

**Attachments**

No Attachments

**Approval Signatures**

Step Description	Approver	Date
Final Approver	Brian Kozik: SVP, COMPLIANCE & PRIVACY	10/2021
	Lucia Pizano-Urbina: AVP, COMPLIANCE [LH]	10/2021