2023 NEHIA HFMA Conference: Follow the Money: Physician Contracting and Compensation – Key Trends and Risk Areas

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AGENDA

1. Stark Law: Regulatory enforcement landscape
2. *Case study: Recent regulatory enforcement*
3. Internal Audit's role in Provider Contracting/ Compensation internal audit review
4. Emerging areas of risk in compensation
5. *Case study: Stark Assessment IA result*
6. Attorney Client Privilege: perspectives from Legal and use in internal audit
7. Q&A

Key takeaways

At the end of the presentation, attendees should be able to better understand:

1. Opportunities to leverage technology, including analytic and AI tools, to perform Provider contracting and compensation internal audit reviews
2. Hear about emerging risks related to trends in physician compensation
3. Application and importance of attorney client privilege in internal audit and other assessments

STARK LAW: REGULATORY ENFORCEMENT LANDSCAPE

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- U.S. Laws and Regulations
  - > The False Claims Act
  - > The Anti-Kickback Statute
  - > The Stark Law
- Recent Regulatory Enforcement
- Attorney-Client Privilege in Internal Investigations

U.S. Laws and Regulations

FEDERAL LAWS & REGULATIONS

There are several federal laws and regulations that govern work in the healthcare industry. Notably:

- False Claims Act (civil damages and penalties)
- Anti-Kickback Statute (criminal, civil, and administrative penalties)
- Stark Law (civil and administrative penalties)

FALSE CLAIMS ACT ("FCA")

- Civil statute prohibiting the knowing submission of false or fraudulent claims for payment to the government
  - > Claim must be false or fraudulent
  - > Person must know that claim is false or fraudulent
  - > The falsity must be material to the government's decision to pay the claim
  - > Liability attaches to those who present, or who cause another to present a claims for payment
- Also prohibits creation or use of false records material to a false or fraudulent claim, retaliation against whistleblowers, and wrongfully retaining overpayments
- Violations carry heavy penalties:
  - > Mandatory treble (3x) damages
  - > Mandatory penalties of $13,508 to $27,018 per claim

FEDERAL ANTI-KICKBACK STATUTE ("AKS")

- The AKS prohibits directly or indirectly offering, paying, soliciting or receiving remuneration to reward or induce referrals of Federal healthcare program beneficiaries

- Key Concepts
  - > Applies to all persons & entities and all items and services
  - > Applies to all federal health care programs
  - > Many states have similar laws that prohibit inducing referrals regardless of payor (public or private)

AKS – KEY TERMS

- "Remuneration" is
  - > Anything of value
  - > Cash or in-kind
  - > Direct or indirect
  - > No "de minimus" exception

- A "referral" means:
  - > "Referring"
  - > "Purchasing"
  - > "Recommending"
  - > "Arranging for"
  - > Also implicates relationships with those who *recommend* referral or purchase (e.g., office staff; marketing consultants (non-employed); coordinated care providers; clinic employees / owners; advertisers, etc.)

AKS – "KNOWING AND WILLFUL"

- Violation must be knowing and willful
  - > Intent is an essential element of an AKS violation
  - > Acting voluntarily and intentionally (not by mistake or accident)
  - > No knowledge of the AKS, or specific intent to violate the AKS, is required

- Government applies the "One Purpose Test"
  - > If *any one purpose* of the payment is to obtain referrals, government argues arrangement is illegal
  - > Other legitimate business purposes do not make the arrangement legal; under the law, a legitimate purpose is irrelevant

AKS – SAFE HARBORS

- Certain arrangements that satisfy an applicable "safe harbor" may be immunized from civil and criminal prosecution
  - > All elements of safe harbor must be met; detailed legal analysis needed
  - > Common elements include a signed agreement, fair market value compensation set in advance and not determined in a manner taking into account the volume or value of referrals or other business generated
- Arrangements outside of safe harbor subject to examination of facts and circumstances

AKS – PENALTIES

- Violations of the AKS may result in:
  - > Criminal fines or imprisonment
  - > Administrative civil monetary penalties
  - > Exclusion from participation in government programs

- Civil False Claims Act liability:
  - > Mandatory treble (3X) damages
    - – Damages = amount paid on “tainted claims”
  - > Mandatory penalties between $13,508 to $27,018 per claim

THE STARK LAW

- Prohibits a **physician** from **referring** Medicare beneficiaries for the furnishing of certain "**Designated Health Services**" ("DHS") to any "**entity**" with which the physician (or immediate family member of the physician) has a "**financial relationship**," unless a statutory or regulatory exception is satisfied

- Key Concepts
  - > "Financial Relationship" means ownership, investment, or compensation relationship
  - > Definition of "referral" is broad for Stark Law purposes
  - > Compliance with an exception is mandatory and all elements of an applicable exception must be met
  - > A strict liability statute – means intent is irrelevant

STARK – COMMON EXCEPTIONS

Any arrangement that implicates the Stark Law must meet the requirements of an applicable exception

Examples of Exceptions:

- Professional services agreements (e.g., medical directors, on-call coverage)
- Employment agreements
- Space and equipment leases
- Recruiting agreements
- Incidental medical staff benefits
- Non-monetary compensation
- Professional courtesy
- Physician purchase of items/services
- Fair market value

Common Requirements:

- Written agreement, signed by the parties
- Agreement sets out defined duties, items or services provided
- Commercial Reasonableness
- Compensation is fair market value
- Compensation cannot take into account the volume or value of referrals or other business generated

STARK – PENALTIES

- Violations of the Stark Law may result in:
  - > Denial of payment
  - > Refund of amounts collected as a result of improper billing
  - > Civil Monetary Penalties per item or service plus three times the amount claimed if “knowing”
  - > Exclusion from Medicare / Medicaid programs
  - > FCA liability for claims tainted by Stark Law noncompliance:
    - – Mandatory treble (3X) damages of amount paid on each claim if tried to judgment
    - – Mandatory penalties between $13,508 to $27,018 per claim

Recent Enforcement Actions

RECENT ENFORCEMENT

Pacific Alliance Medical Center (2017)

- $42 million settlement with PAMC of Los Angeles, California
- Resolved allegations that:
  - > PAMC was involved in improper financial relationships with referring physicians in the form of (1) above market rent payments and (2) marketing arrangements whereby PAMC paid thousands of dollars each month to market physicians' practices in exchange for referrals
  - > Rent payments for subleasing the physician's office for only one hour per month were "grossly inflated" – physicians were paid one-fourth of the physician's entire monthly rent, entire monthly cost of supplies and entire monthly cost of utilities

RECENT ENFORCEMENT

Wheeling Hospital (2020)

- $50 million settlement with Wheeling Hospital of Wheeling, West Virginia
- Resolved allegations that:
  - > Wheeling entered into compensation arrangements with referring physicians that were above fair market value
  - > After years of significant financial troubles, Wheeling realized almost a $90 million profit in five years under new management. A significant factor of the turnaround was the hiring of a large number of physicians under improper physician compensation arrangements
  - > Wheeling paid employed physicians incentive compensation in the form of a percentage of the net income of the practice attributable to DHS referrals

RECENT ENFORCEMENT

Akron General Health System (2021)

- $21 million settlement with Akron General Health System (AGHS) (now affiliated with the Cleveland Clinic) in Ohio
- Resolved Allegations that:
  - AGHS had purchased practices and compensated employed physicians in excess of FMV in order to control patient referrals for inpatient/outpatient services
  - AGHS tolerated the losses and excess compensation associated with the physician practices because the health system "tracks the value of the referrals obtained from those same physicians and knows that it can more than make up for those losses through the marginal gains in income … for inpatient and ancillary services."
  - The physician compensation arrangements also included a bonus pool determined in part by net collections (non-personally performed services).
- The Relator was the Director of Internal Audit at AGHS

Internal Audit's role in Stark Compliance

Data-driven approaches to auditing

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*An internal audit an **independent, objective** assurance and consulting activity designed to **add value and improve** an organization's operations. It helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and **improve the effectiveness of risk management**, control, and governance processes*.

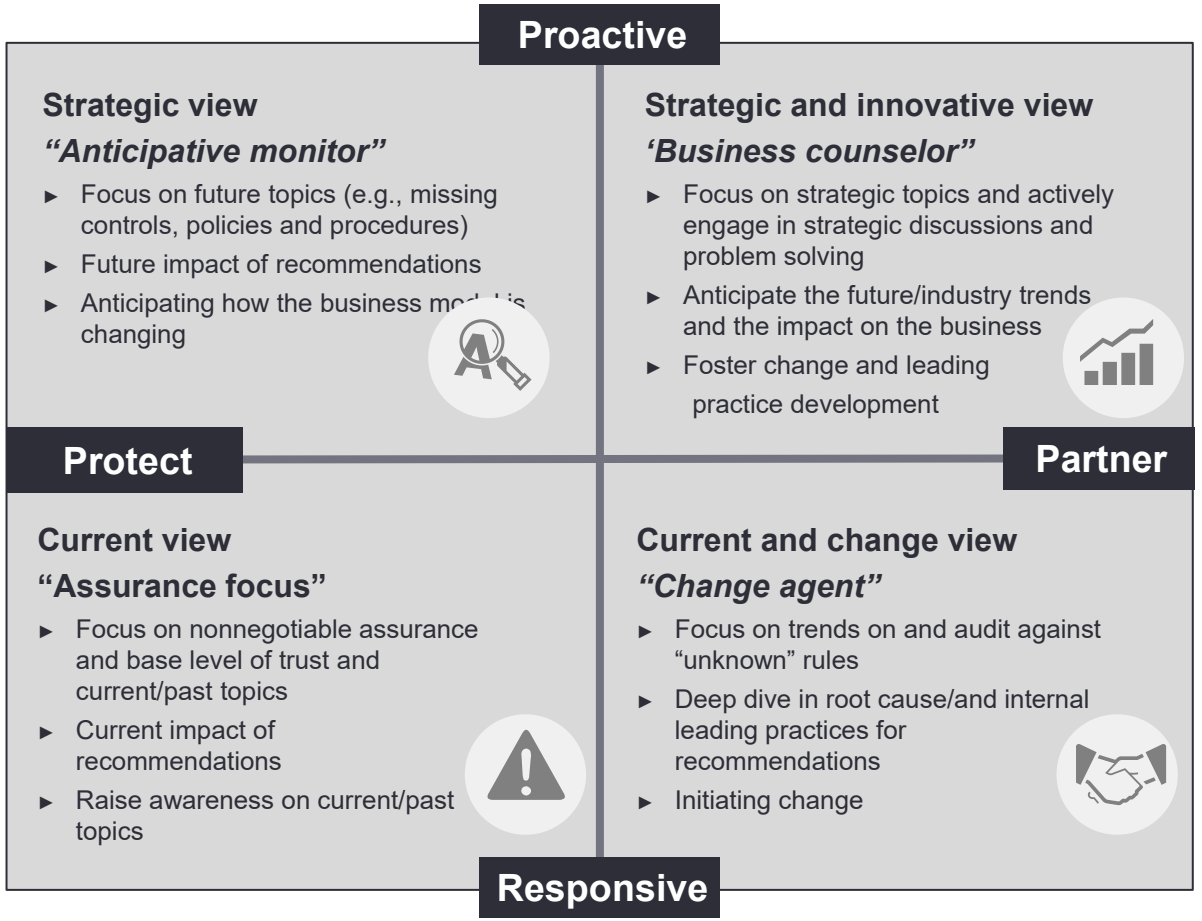
-Institute of Internal Auditors

IA's historical role in performing Stark assessments

- IA is often called upon to perform Stark assessments as noncompliance carries significant **financial, compliance and reputational penalties**.
- Traditional approaches to testing are **sample-based, random and require significant time** from the auditee to gather supporting documentation.
- **Emerging and complex regulations, technologies and disruptive business practices** create new risks and require an **expanded definition of risk**. To be successful, organizations will need to shift their focus from simply mitigating risk.
- As the mandate of IA evolves, **new scoping and testing approaches** are challenging the status quo to **provide more value**.

Expanding the mandate of Internal Audit to deliver more value

Upside risks	Outside risks	Downside risks
Risks that offer benefits and are significant to the organization's ability to execute business strategy and achieve objectives	Risks that offer negative or positive benefits beyond the organization's control	Risks that offer negative impacts. Risked to be eliminated, avoided, mitigated or transferred in a cost-effective manner
Potential for innovations to grow consumer bases Increasing market share Acquiring, managing, and deriving value from new assets and talent	Actions of existing and emerging competitors Geopolitical and economic megatrends Demographic and environmental megatrends	Information security and cybercrime (also an outside risk) Employee fraud, and regulatory compliance Enterprise resiliency — technology and business continuity



Internal Audit's role in supporting Stark compliance: *Key Questions*

People & Governance

Policies:

- Do documented policies and procedures exist for physician contracting and compensation?
- Do AP policies include guidance for vendor set up and payment of non-employed physicians?

Roles and responsibilities:

- Are policies in place for medical leadership contracting processes?
- Who is responsible for negotiating, approving, and retaining physician contracts and FMV? Review of invoices?

Training:

- What policies or documentation exists to provide guidance to employees/ contractors?
- Are key personnel aware of the regulations impacting physician contracting?

Process

Contracting

- Can all physician contracts be located?
- How are contracts identified upon expiration?
- Is there a procedure for contract approval, including legal review?

Fair Market Value (FMV)

- How is FMV determined?
- Where is FMV documentation stored?
- What is the process to renew FMV?

Ongoing monitoring

- Are controls in place to ensure compliance with regulations? What monitoring is performed?
- Is there review/monitoring of hours worked and expected performance performed?

Technology

Contract and FMV retention, tracking, approval

- What systems are used to manage contracts and FMV documentation?
- What reporting capabilities does the system have?

AP and accounting

- Can the accounting system identify a population of payments to physicians?
- How does AP/accounting review or process physician payments?
- Are there any data-driven reviews (ex: monthly budget variance reports) to detect and prevent inappropriate payments?

Internal Audit's role in supporting Stark compliance

A Stark assessment internal audit typically follows these common fieldwork procedures:

Obtaining data. Data may include vendor master file, population of physicians, payroll and AR detail, general ledger accounts.

Selecting a sample. Internal audit teams should consider the most impactful approach to select samples given the amount of data available.

Obtain supporting documentation. Including active contracts and any active amendments, FMV analysis, originating request for payment, approval of payment requests.

Validate payment appropriateness. Compare payment and supporting documentation to underlying contract or arrangement.

Conducting interviews. If necessary, understand any variances from contract or variances from written policy or expected process with management.

Key controls and documents reviewed as part of a Stark Assessment

Working with management to understand the availability of data and documentation is critical to perform successful testing procedures. There are significant variances in the ability to perform data-driven procedures related to Physician contracting based on contracting, AP and technology.

Contracts or agreements for physicians are active and not expired

Contracts for medical leadership to ensure the contracts are commercially reasonable, include detail of the services provided.

Any additional service agreements with the physician or medical group to ensure the aggregated contracts are reasonable and do not cause instances of non-compliance.

Evidence a fair market value review was performed prior to the contract start date and annually or upon occurrence of a triggering event.

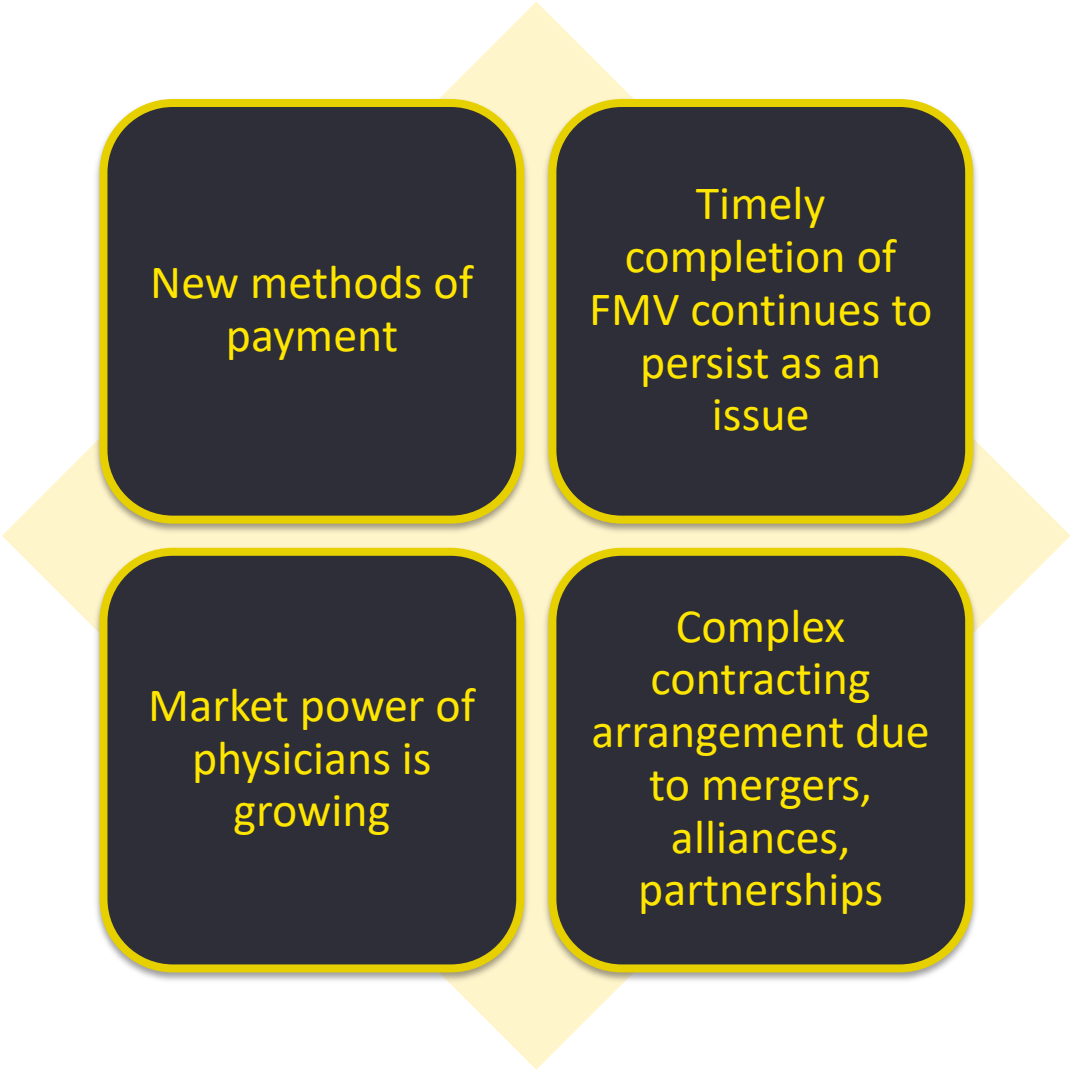
Time logs for completeness, accuracy and compliance with contract requirements.

Payments rates are consistent with contract requirements. Review is evidenced.

Technology can play a crucial role in supporting physician contracting compliance

Contract Management Systems	• Implement software to streamline the contract lifecycle, centralize contracts, track key dates, and automate review and approval workflows.
Compliance Monitoring	• Utilize technology for automated alerts, KPI tracking, and real-time reporting to ensure adherence to contractual terms and regulations.
Documentation and Record-keeping	• Digitize contract documents, amendments, and correspondence for secure storage, easy retrieval, and audit purposes.
Compliance Reporting and Analytics	• Generate comprehensive reports and employ analytics to identify trends, risks, and support proactive compliance management.
Integration with Compliance Frameworks	• Integrate technology solutions to align with compliance policies, promote consistency, and facilitate regulatory adherence.
Version Control and Audit Trails	• Employ technology for proper version control, allowing clear visibility and accountability by timestamping all contract changes.
Collaboration and Communication	• Leverage electronic signature capabilities, document sharing, and secure messaging platforms to facilitate efficient collaboration among stakeholders.

Emerging risks in provider compensation



Emerging risks in provider compensation

Value-Based Reimbursement:
With the shift towards value-based care, there is a growing emphasis on rewarding physicians based on patient outcomes, quality measures, and cost savings. The risk lies in ensuring appropriate measures are established, accurate data is collected, and fair compensation models are developed.

Alternative Payment Models:
Emerging payment models, such as accountable care organizations (ACOs) and bundled payments, require physicians to manage financial risk and meet performance targets. Physicians may face challenges in understanding and adapting to new payment models, including potential financial losses if expenses exceed target benchmarks.

Productivity Metrics and Incentives:
Traditional productivity-based compensation models often focus on volume-based metrics, such as productivity units or revenue generation. However, there is an emerging need to align compensation with value-based metrics, quality measures, patient satisfaction, and care coordination. Developing appropriate metrics and ensuring fair incentives can be challenging.

Fair Market Value Compliance:
Ensuring physician compensation aligns with fair market value (FMV) guidelines is critical to avoiding compliance violations, such as Stark Law and Anti-Kickback Statute. Changes in regulatory requirements and interpretations can create emerging risks, making it important to regularly review and update compensation arrangements.

Physician-Hospital Alignment:
Health system integration, mergers, and alignment strategies can introduce risks related to physician compensation. It is crucial to assess financial and legal implications accurately, negotiate fair compensation terms, and address potential conflicts of interest between hospitals and employed physicians.

Physician Burnout and Well-being:
Physician burnout is a significant concern in healthcare, and compensation can play a role in promoting physician well-being. Emerging risks include inadequate compensation for additional administrative burdens or non-clinical tasks, which may contribute to burnout. Balancing compensation and workload to support physician well-being is crucial.

Case study: Using technology to enhance Stark Internal Audit assessments

Background: IA was asked to perform a Stark assessment with a focus on using analytics and data to identify gaps in the process.

Outcome: use of technology allowed for more efficient testing (greater coverage) while reducing workload on the auditees.

Examples of technology-driven testing:

- Identification of payments outside established channels via key word analytic search in vendor master file
- Population-level testing for timeliness of expiration and renewal for FMV and contracts
- Mature use of contracting and payment technology to aggregate payments
  - Automated system edits for appropriateness of payments to contracts (rate)
  - Workflows requiring approval by the Business or other AP/Compliance member prior to release of payment
  - System controls to prevent overpayment against annual contract (PO or other mechanism)

Attorney-Client Privilege

ATTORNEY-CLIENT PRIVILEGE

- **Attorney-Client Privilege**
  - > Attorney-client privilege protects communications that are between an attorney and client and made for the purpose of seeking, obtaining, or providing legal advice in confidence
  - > Privilege is not an absolute shield for all communications in litigation
  - > Corporate employees are speaking as "the client" when:
    - – Communication is necessary to the legal advice;
    - – Communication concerns matters within the scope of the employee's duties;
    - – Employee is aware of legal nature of communications; and
    - – Communications are considered confidential
  - > Sharing communications with a third party can destroy the confidentiality and waive privilege

WORK PRODUCT DOCTRINE

- **Work Product Privilege**
  - > Protects work that is:
    - – prepared by a party or its representative and
    - – in anticipation of litigation or for trial
  - > Requires subjective belief by preparing party that litigation was likely and objective reasonableness of belief
  - > Work product protection is waived by a disclosure "inconsistent with the purpose of the privilege" – to safeguard work product in preparation for litigation
    - – It is not a waiver when:
      - > Parties share a "common interest" and
      - > Have a "reasonable expectation that the communications would be maintained in confidence" and
      - > Sharing is "reasonably necessary for the purpose for which attorneys were consulted"

CASE EXAMPLE

United States ex rel. Baklid v. Halifax Medical Center

- The suit involved a qui tam action against Halifax Medical Center alleging civil violations of the FCA due to violations of the Stark Law and AKS
- Relator asked the court to determine whether documents and communications created by non-legal departments related to audits and reviews of the Hospital's compliance efforts were protected by attorney-client privilege. All documents were stamped "Attorney-Client Work Product"
  - > The court found many of the documents were not privileged because they were ***not addressed to an attorney***
  - > The court found that even communications that were addressed to an attorney were not privileged if ***they were also addressed to many other non-attorneys*** because the primary purpose of the communication was not for legal advice

CASE EXAMPLE

United States ex rel. Baklid v. Halifax Medical Center

- Relator asked the court to determine whether a compliance log that the Hospital maintained of possible compliance issues was protected by attorney-client privilege
  - > The court ruled that the log was not privileged because ***none of the logs evidenced legal advice being sought or received***
- Relator challenged applying the attorney-client privilege to documents that related to the facilitating, rendering, and requesting of compliance advice. Halifax argued that these documents were privileged because its organizational structure is such that the compliance department "operates under the supervision and oversight of the legal department"
  - > The court found that the organizational structure of the Hospital was of no consequence for the privilege analysis
  - > The court then determined that Halifax failed to meet its burden to prove that the primary purpose of the compliance documents was to seek or give legal advice

TIPS ON PRESERVING PRIVILEGE

- **Organization**: Establish and follow a policy on copying and distributing documents containing legal opinions and advice
- **Limit**: Limit the distribution of legal advice to people who have a need to know on the privileged communications
- **Flag as Privileged**: Stamp or in some way identify documents that are privileged to make them easy to identify
- Include **mental impressions and opinions** in memoranda summarizing interviews and evidence

Questions?