

**Compliance Webinar
Two Part Series**

Does Your Real Estate Compliance Program Need First Aid?

Presented by:

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- Primary Elements of a Compliance Program
- Government Investigations
- Legal Framework
- Key Stakeholders for a Compliance Program
- External Consultants
- Training and Education
- Common Compliance Pitfalls
- Standardized Documents
- Automated Tracking Systems
- Questions

OIG issued a resource on March 27, 2017 that serves as a guidance for health care organizations when assessing the adequacy and effectiveness of their compliance programs.

It identified seven key areas:

1. Standards, policies and procedures
2. Compliance Program administration
3. Screening and evaluation of employees, physicians, vendors and other agents
4. Communication, education
5. Monitoring, auditing and internal reporting
6. Discipline for non-compliance
7. Investigations and remedial measures

One or more policies should address the following:

- Full-time space leasing arrangements
- Part-time space leasing arrangements
- Purchase and sale of real estate

Policies should specifically address the following:

- Initiation and approval process
- Referral arrangements
- Fair market value
- Space measurement / land surveying
- Ongoing education
- Auditing
- Accountability

- **Government investigations**
- **Whistleblower actions**
- **Civil and criminal liability**
- **Tax-exempt status**
- **Bad publicity**

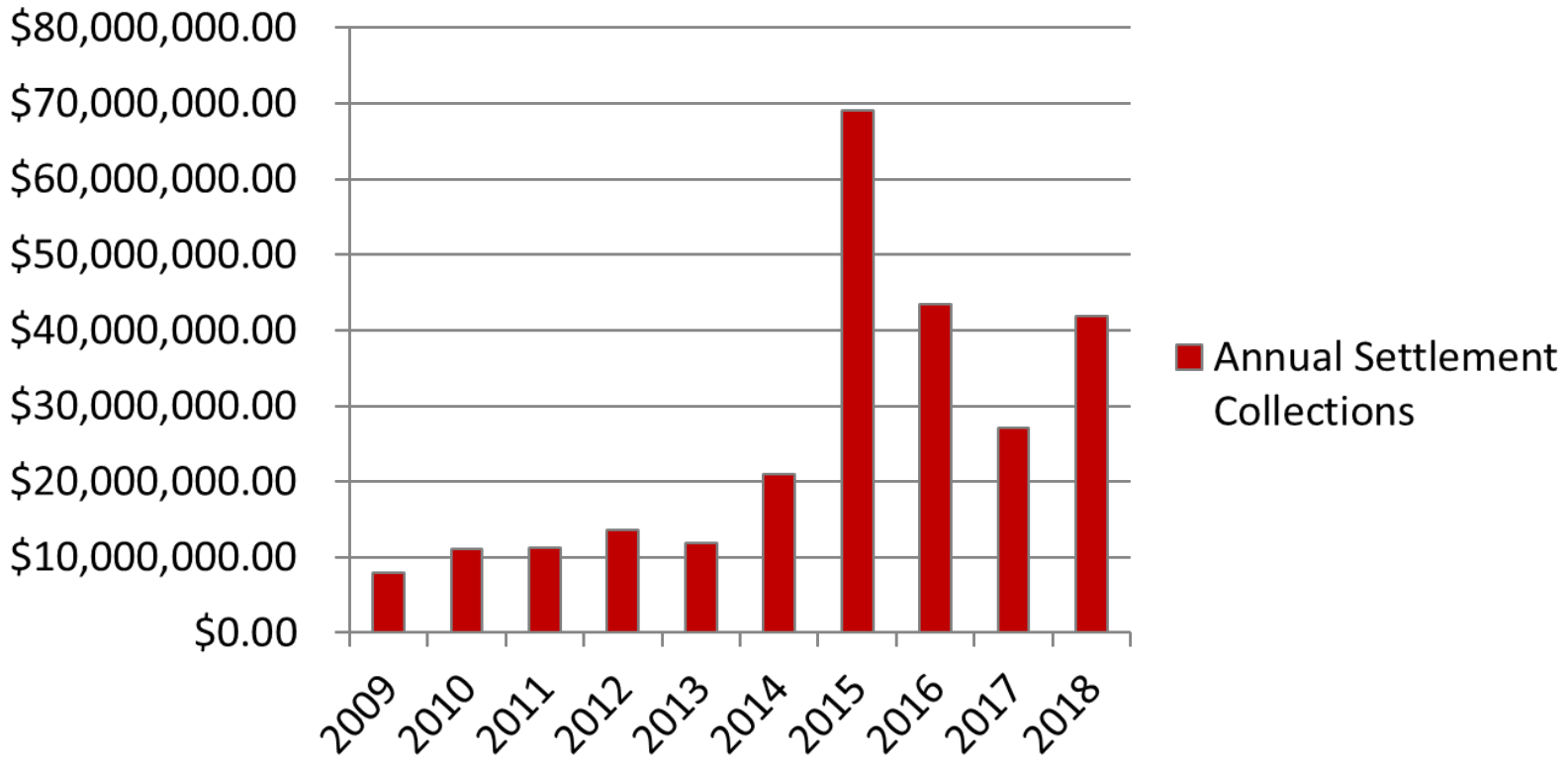
Big Business:

- \$2.4 billion in total Government recoveries for health care fraud
- Department of Justice launched over 1900 new civil and criminal health care investigations
- OIG excluded over 3,244 individuals and entities
- Every \$1 spent on investigations resulted in \$4 recovered
- Exponential growth in whistleblower (*qui tam*) cases

Logical Conclusion:

- Know the regulatory requirements
- Develop a robust compliance program

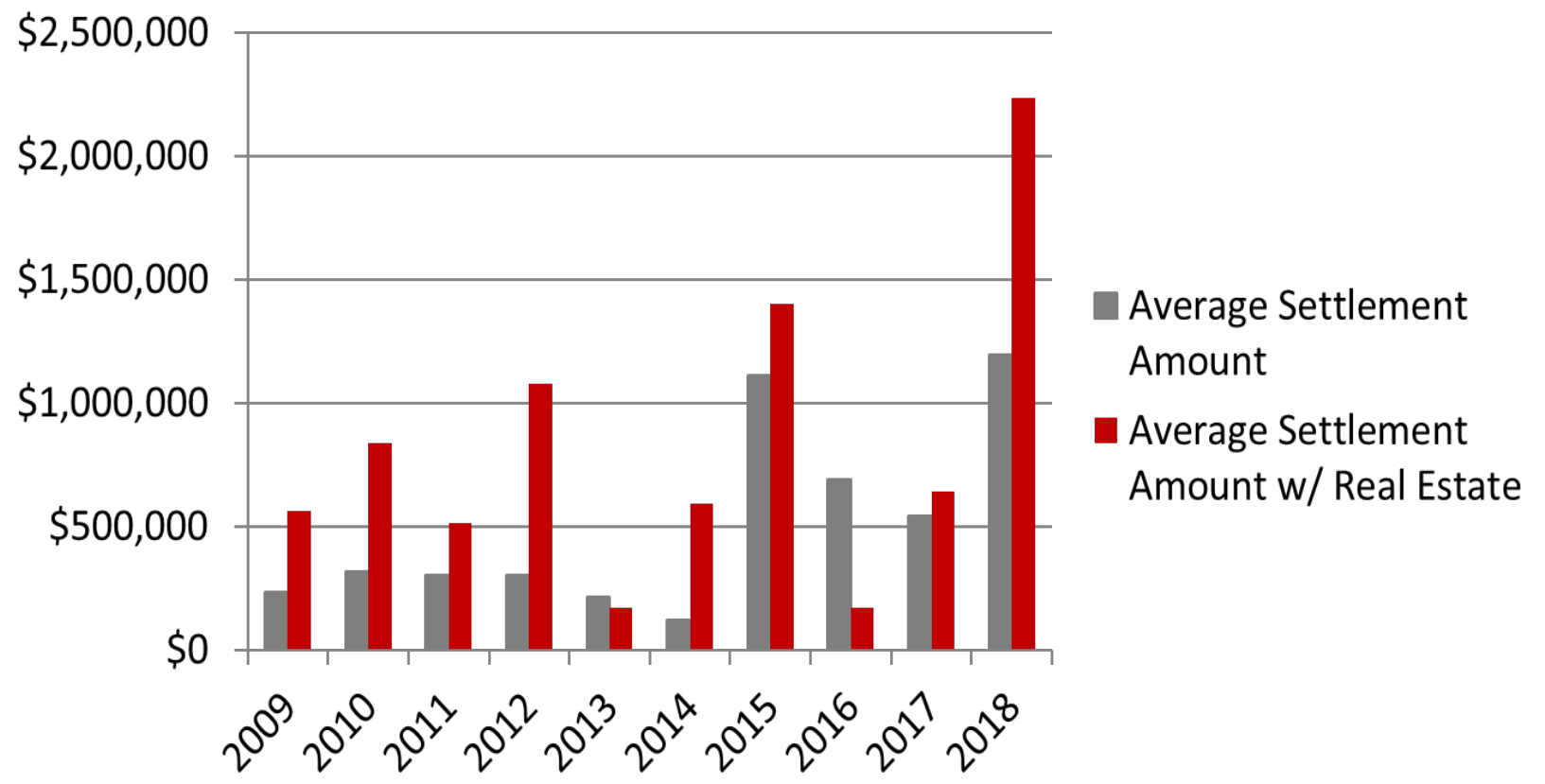
OIG Settlement Data



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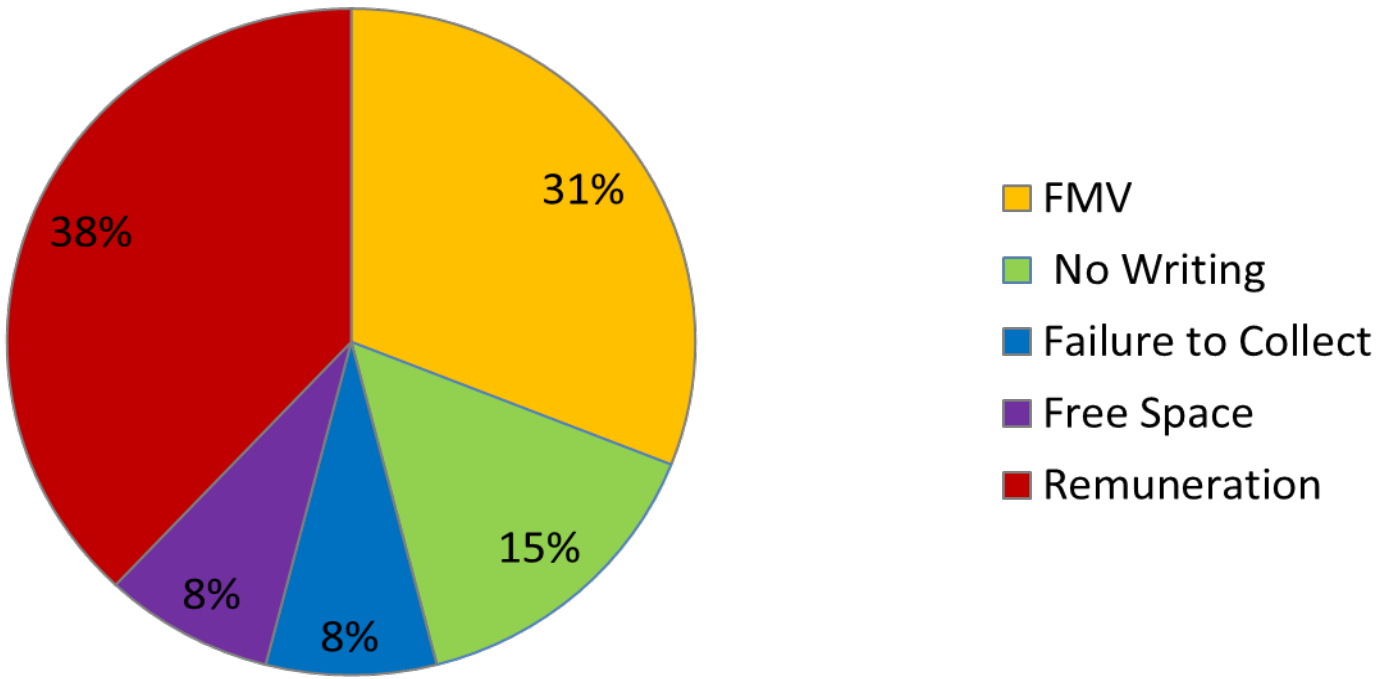


OIG Settlement Data



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- **Sacred Heart Hospital**
- **BayCare**
- **Tenet Healthcare**
- **Quest Diagnostics**
- **Metroplex Hospital**



- **Stark Law**
- **Anti-Kickback Statute**
- **False Claims Act**
- **Civil Monetary Penalties Law**



The Stark Law (42 U.S.C. 1395nn) prohibits a physician from making referrals for "designated health services" ("DHS") payable by Medicare/Medicaid to an entity with which the physician (or an immediate family member of the physician) has a financial relationship and prohibits the entity from billing Medicare/Medicaid for DHS, unless an appropriate Stark exception applies.



The Government may impose a civil money penalty of up to \$15,000 against any person whom:

- Has presented or **caused to be presented** a claim for a payment that such person knows, or **should know**, may not be made under Medicare or Medicaid.
- In addition, Stark sanctions include exclusion from Medicare and Medicaid and fines of up to \$100,000 for circumvention schemes.
- *Qui tam*/false claim actions may also reference Stark violations.



- Lease is in writing and signed by both parties
- Space being leased is described and does not exceed that which is reasonable
- Term of at least one year
- Rent is **set in advance** and is consistent with **fair market value**
- Rental rate is not determined in a manner that takes into account the volume or value or referrals
- Lease is **commercially reasonable**
- Holdover arrangements limited to 6 months

Definition of Fair Market Value

- The value for general commercial purposes
- No premium for the proximity or convenience to the **lessor** where the **lessor** is a potential source of patient referrals to the lessee



- Burden of establishing FMV rests with the parties
- FMV can be established using any valuation method that is commercially reasonable
- The appropriate valuation method will depend on facts and circumstances
- e.g., comparables from another geographic area
- CMS will not create bright-line valuation rules



Definition of Commercial Reasonableness

- Commercially reasonable **even if no referrals** were made between the parties.
- A sensible, prudent business agreement from the perspective of the parties involved, even in the absence of referrals.
- Reasonable and necessary for the legitimate business purpose.



Valuation Consultants

- **Extensive Healthcare Experience**
 - Fully Grasp the Regulatory Pitfalls and Importance of Report to the Client
 - What Percentage of Their Work is Healthcare?
 - Ability to Defend Their Conclusions
- **Firm's Experience in Other Healthcare Real Estate Areas**
 - Knowledge of Construction Costs (TI Allowance)
 - Do They Understand the Property Management Function (Especially with Operating Expenses)



It is a criminal offense to:

1 knowingly
and
willfully

2 solicit,
receive,
offer or
pay

3 remuneration,
directly or
indirectly,
overtly or
covertly, in
cash or in kind

4 for referring
or arranging
Medicare or
Medicaid
services

Violation is a felony

- Up to \$25,000 fine
- Up to 5 years imprisonment
- May also result in imposition of civil monetary penalties
- May be excluded from government health care programs



Two-way street: liability for both those offering (hospital) and receiving (physician) remuneration

***Qui tam*/false claim actions may also reference AKS violations**

- ***Greber* test: if even one purpose of the arrangement is to induce referrals, there is an AKS violation. *U.S. v. Greber*, 760 F.2d 69 (3rd Cir. 1985)**
- **Under the Affordable Care Act amendments, there is no requirement of actual knowledge or specific intent to commit a violation of the AKS**
- **Government can infer intent from the totality of the communications and record regarding an arrangement**

- In writing and signed by both parties
- Space is described in detail
- Time period for access (full time or part-time)
 - If part-time – occupancy schedule should be attached
- Term of at least one year (why?)
- Rent is **set in advance** and is consistent with fair market value
 - Rent cannot take into account the volume or value of referrals or business generated by the parties
- Space does not exceed that which is necessary to accomplish a reasonable business purpose

- The value for general commercial purposes
- No premium for the proximity or convenience to referral sources
- Not limited to scenarios where the lessor is the source of referrals

Stark

- Strict liability
- Civil liability
- Applies only to financial relationships with “physicians” or their immediate family members
- Exceptions = “must”

AKS

- Intent-based
- Criminal liability
- Broader application – implicates more relationships
- Safe harbors = “should”



- **Determine the “Real Estate Team”**
 - Property Management
 - Facilities and Construction
 - Leasing Administration
 - Internal Audit / Compliance
 - Accounting / Finance
- **Corporate Handbook / Policy Manual**
 - Widely Distributed among Employees (New Employee Orientation)
 - Comprehensive Feedback across “Team Disciplines”
 - Includes Standardized Documents List
 - Must include Communications Protocol
 - Property Management Issues (Leasing)
 - Outstanding Rents
 - Other “Atypical” Events



- **Annual Training Requirement (?)**
 - Who Needs to Attend
 - Things to Discuss
 - Overview Policies and Processes
 - New Rulings or *CMS* Guidance
 - How to Achieve Best Practices
- **External Resources for Educating Employees**
 - BOMA / Interface Conferences
 - CCIM / CPM and Other Designations for Employees



Date: October 10, 2018

Attendees: Employee Name
Employee Name

Agenda:

- Update: Healthcare Real Estate
 - Anti-Kickback Statute
 - Physician Self-Referral Law (STARK)
- Operational Compliance Session
 - Required Information for Lease Clauses
 - Ground Leases
 - Operating Expenses
- Leasing Policy Update
 - FMV Market Studies
 - Update Construction Costs for TI
 - Best Practices Discussion: Outside Law Firm

Conferences / Webinar

- | | | |
|------------|------------------------|------|
| • BOMA: | Annual Meeting | Date |
| • Webinar: | Healthcare Compliance | Date |
| • Seminar: | Healthcare Real Estate | Date |



- **Transactional**

- Transactional compliance pitfalls – pitfalls that stem from the lease arrangement itself and the specific structure of the transaction

- **Operational**

- Operational compliance pitfalls – pitfalls that stem from the subsequent administration, or lack thereof, of the lease arrangements with referring physicians

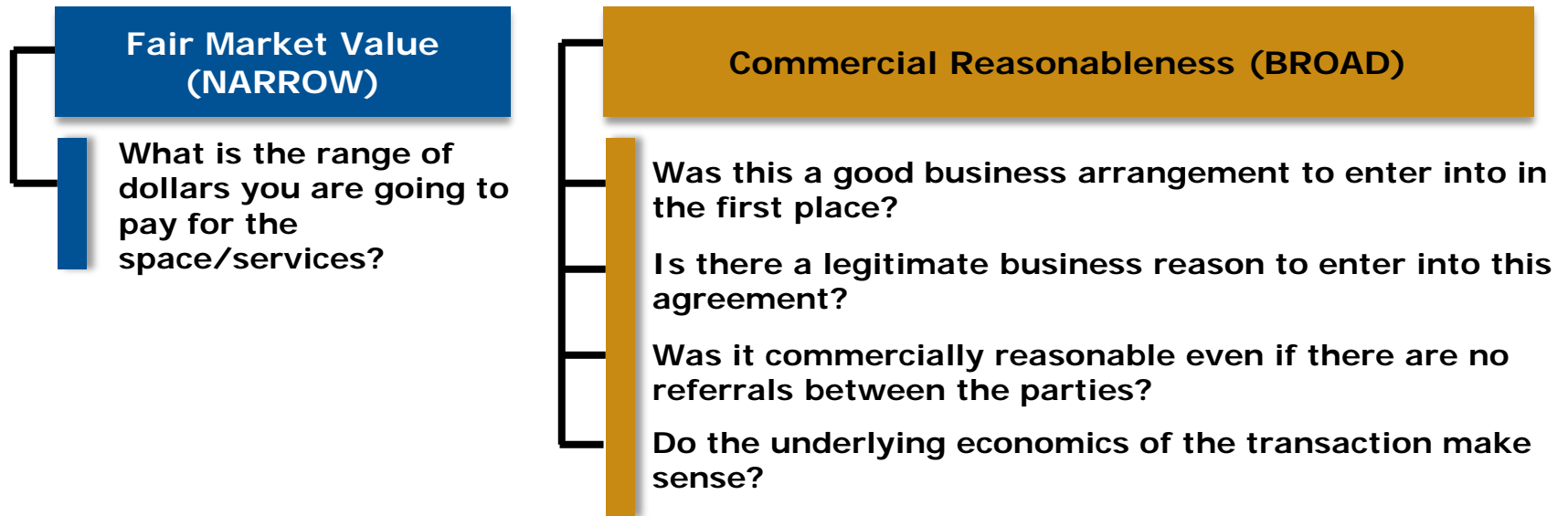
Compliance Pitfalls: Examples

Compliance Pitfalls	Transactional	Operational
Rent	Rent Rates Rent Abatements Rent Escalators	Rent Collection Rent Escalation Late Fees Holdover Premiums
Square Footage	Size of Premises	Space Creep
Tenant Improvements	TI Allowances	TI Overages
Operating Expenses	Types of Leases Operating Expense Components	Operating Expense Reconciliations
Off-Lease Benefits	Unaccounted for in the Rent Rate Not mentioned in the Lease	Medical Waste Removal Parking and Valet Services Telephone and Internet Meals
Timeshares	Office Rental Exception Timeshare Exception	Schedule Enforcement Space Creep

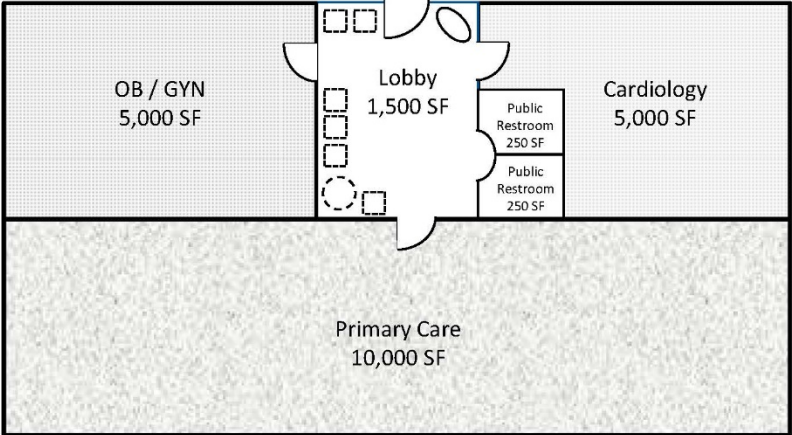


Commercial Reasonableness is Slightly Different than Fair Market Value

Does the transaction make ~~cents~~ sense?



Compliance Pitfalls: Why Measurement is Important



- ✓ Total building useable square footage?
- ✓ Total building common area?
- ✓ Total building rentable square footage?
- ✓ What is the R/U Ratio?

	USF	RSF
Primary Care	10,000	11,000
OB/GYN	5,000	5,500
Cardiology	5,000	5,500
Sub-Total	20,000	22,000
Common Area	2,000	-
R/U Ratio		1.10

.....
If rent is \$16 per SF, the difference is \$32,000 in annual rent payments.



- **Leasing Manual**

- Levels of Authority
- Regulatory Guidelines
- Timeshare Agreements
- Leasing Documents
- Step-by-Step Process for Approving Leases
- Guidelines for Quoting Rents
- Tenant Improvement Allowances

- **Document Library (Developed by Legal Department)**

- Letter of Intent (LOI)
- Lease Agreement
- Amendment Document(s)
- Timeshare Agreement (License)
- Annual Checklist for Operating Expense Reconciliation

- **FMV and CR Checklist**

- Definitions of FMV and CR
- Lease Classification (Gross, Triple Net, Other)



- **Important Information**

- Type of Lease (Gross, Expense Stop, Other)
- Monthly Rent Amount
- Tracking Work Orders
- AR Aging Report
- Two Year Look Ahead (Term) / One Year Look Ahead (Term)
/ Six Month Look Ahead (Term)
- Space Availability

Questions & Answers



If you have questions about the presentation, please contact us



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