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OIG Disapproves Two Referral Arrangements as Kickbacks

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A recent [OIG Advisory Opinion \(No. 12-06\)](#) proves once again that you can't make a silk purse from a pig's ear: A disguised kickback is still a kickback.

Referring physicians often dress up kickback demands in the form of "management fees" and so-called "company model" joint ventures. This is common in anesthesia — which the OIG advisory opinion references — but can just as easily affect any referral-based specialty, including radiology.

Prior to the formation of the "company," specialty services are provided by physicians for their own, or their group's, account. After formation, only those specialists who become employed or subcontracted remain, with a significant share of the fees redirected to the company model's owners, the referring physicians.

In the management fee model, specialists are charged a “use” fee, are charged for normal services rendered by the facility’s staff, or are charged for the “rent” of space within the facility.

The federal anti-kickback statute (AKS) prohibits remuneration — that is, the transfer of anything of value — for referrals. Courts have interpreted the AKS to apply even if only one of many purposes is to obtain money for referrals. So-called “safe harbors” protect some conduct but the failure to qualify for one does not automatically mean a violation.

The OIG previously issued two fraud alerts on joint ventures, which are any arrangement, contractual or involving a new entity, between a party in a position to refer business and who receive referrals. Advisory Opinion 12-06 was the OIG’s first pronouncement directly on the propriety of the company model. It also addressed a purported management fee.

The OIG stated that because both Medicare and private payors set reimbursement taking into account the expenses of the type included with the management fee, the facilities would be paid twice. That double payment could unduly influence the selection of the specialists.

In analyzing the proposed company model arrangement, the OIG stated that even if safe harbors applied to the investment in the facility and to the payments to the specialists, there was no safe harbor available in respect of the distributions the referring physicians they would receive from their company model entity, and such remuneration would be prohibited under the AKS if one purpose of the remuneration is to generate or reward referrals.

Note that this means that fair market value compensation to the specialists (which is what many “experts” think is the magic bullet in terms of all compliance – it is not) is not the entire the analysis.

Turning to its 2003 Special Advisory Bulletin on Contractual Joint Ventures, the OIG found that the physician owners of the proposed company model entity would be in almost the exact same position as the suspect joint venture the Bulletin describes: in a position to receive indirectly what they cannot legally receive directly – a share of the specialists' fees in return for referrals.

The bottom line is that both company model ventures and management fee arrangements are fraught with kickback danger for all parties involved.

Each situation must be analyzed carefully as there is a high chance of an AKS violation leading to criminal fines, civil penalties, exclusion as a provider and even imprisonment.

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