POLICY & MANAGEMENT

OIG Opinion Adds Clarity to Illegality of Company Model

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On Nov. 12, 2013, the Office of Inspector General (OIG) of the Department of Health and Human Services released Advisory Opinion 13-15 dealing with a situation closely akin to a "company model" deal.

Underlying 13-15 was a proposed arrangement whereby a psychiatry group performing electroconvulsive therapy (ECT) at a hospital would capture the difference between the amount it collected for the anesthesia care of ECT patients and the per diem rate it would pay to anesthesia providers.

Importantly, although not officially part of the opinion, the OIG raised concern over the hospital's grant of a carve out from an exclusive anesthesia contract in favor of a referring physician.

The Facts

Initially, an anesthesia group held the exclusive contract to provide all anesthesia services at the hospital. Then, in late 2010, a psychiatry group with a practice centering on performing ECT procedures relocated to the hospital. "Dr. X," board-certified in both psychiatry and anesthesiology, is one of the owners of the psychiatry group.

In 2011, the anesthesia group began negotiating with the hospital for the renewal of its exclusive contract. The hospital demanded an initial carve out: Dr. X would be allowed to independently provide anesthesia services to ECT patients.

The following year, when negotiating the 2012 renewal, the hospital demanded amendments to the carve-out provision. Among them: Dr. X would be allowed to provide anesthesia services to ECT patients and the anesthesia group would be required to provide coverage for Dr. X.

Pursuant to what was called the "Additional Anesthesiologist Provision," the psychiatry group would determine if an additional anesthesiologist was needed for ECT anesthesia. If so, the anesthesia group would negotiate to provide those services. If the anesthesia group and the psychiatry group did not agree on terms, the psychiatry group or Dr. X could contract with an additional anesthesiologist.

Subsequently, the psychiatry group informed the anesthesia group that an additional anesthesiologist was needed. The parties began negotiating.

Under the proposed arrangement presented to the OIG, the anesthesia group and the psychiatry group would enter into a contract pursuant to which the anesthesia group would provide the additional ECT anesthesia services. The anesthesia group would reassign to the psychiatry group its right to bill and collect for the services. The psychiatry group would pay the anesthesia group a per diem rate. The psychiatry group would retain the difference between the amount collected and the per diem rate.

OIG's Analysis

The OIG has stated on numerous occasions that the opportunity to generate a fee could constitute illegal remuneration under the federal anti-kickback statute (AKS) *even if no payment is made for a referral*. Under the proposed arrangement, the psychiatry group would have the opportunity to generate a fee equal to the difference between the amount it would bill and collect and the per diem rate paid to the anesthesiologists.

No Safe Harbor

The OIG found that the proposed arrangement would not qualify for protection under the AKS's safe harbor for personal services and management contracts. Those safe harbors protect only payments made by a principal (here, the psychiatry group) to an agent (here, the anesthesia group). No safe harbor would protect the remuneration the anesthesia group would provide to the psychiatry group by way of the discount between the per diem rate their group would receive and the amount that the psychiatry group would collect.

Although failure to fit within a safe harbor is not fatal by default, the OIG again has illustrated that being put in a position to profit from one's referrals raises significant concerns of prohibited remuneration—that is, of violation of the AKS.

Because failure to comply with a safe harbor does not necessarily render an arrangement illegal, the OIG analyzed whether, given the facts, the proposed arrangement would pose no more than a minimal risk under the AKS.

The OIG flatly stated that "the proposed arrangement appears to be designed to permit the psychiatry group to do indirectly what it cannot do directly; that is, to receive compensation, in the form of a portion of the anesthesia group's revenues, in return for the psychiatry group's referrals of patients to the anesthesia group for anesthesia services."

The OIG concluded that the proposed arrangement could potentially generate prohibited remuneration under the AKS and that the OIG could impose administrative sanctions in connection with the proposed arrangement. In other words, the OIG declined to approve the arrangement.

Importantly, in connection with the relationship between anesthesiology and other hospital-based groups and facilities, although not officially within the scope of the opinion, the OIG also stated that it could not exclude the possibility that 1) the hospital pushed for the carve out to reward the psychiatry group for its referrals of patients to the hospital; 2) the hospital leveraged its control over anesthesia referrals to induce the anesthesia group to agree to the carve out; and 3) the anesthesia group agreed to the carve out in exchange for access to the hospital's stream of anesthesia referrals.

Bottom Line

Advisory Opinion 13-15 once again demonstrates a fact lost to many when discussing the "company model" and similar potential AKS violations: These arrangements generally do not fit into an available safe harbor—the personal services and the employment safe harbors. Not only is this because payment to the physician receiving the referral is not set in advance and will vary with the value or volume of referrals, but even more fundamentally because those safe harbors apply only to payments *from* the principal *to* the agent, not to payments *from* the agent *to* the principal. In 13-15, the discount that permits the referral source to profit from the arrangement is a payment *to* the principal.

Second, although failure to fit within a safe harbor is not fatal by default, the OIG again has illustrated that being put in a position to profit from one's referrals raises significant concerns of prohibited remuneration—that is, of violation of the AKS. Note that payment of so-called "fair market value," the supposed holy grail of anti-kickback analysis, is not a panacea. Schemes that place the referral maker in the position of profiting from its referrals are highly suspicious even in the face of valuation studies and valuation opinions. A pig in a skirt, even a designer one, is still a pig.

Third, although not a part of the official opinion, the hospital's grant of anesthesia services rights to a referral source might itself be a kickback. The contractual right to the benefit of the carve out has value and its grant can be remuneration. If that remuneration was an inducement for referrals to the facility, it was a kickback. This is completely on point with an anesthesia contract between a surgical center and an "anesthesia company" controlled by surgeons who bring their cases to that facility.

Although Advisory Opinion 13-15 provides important guidance in respect of company model–type deals, the issues remain highly complex and involve compliance with a criminal law statute, the AKS. Anyone confronted by, or designing, an arrangement that potentially violates the AKS must obtain counsel well versed in the intricacies of the issues.

The author is the attorney for the anesthesia group that was the Requestor of Advisory Opinion 13-15 and represented it in connection with its request.