# Arrangements between Hospitals and Hospital-based Physicians

A recently issued Supplemental Compliance Program Guidance sheds some light on the OIG's views

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On Jan. 31, 2005, the Office of Inspector General (OIG) for the Department of Health and Human Services released its Supplemental Compliance Program Guidance for Hospitals in final form.[1] The Guidance builds upon prior guidance issued in 1998[2] with an expanded discussion of risk areas and new compliance recommendations, including ways to measure and improve the effectiveness of an existing compliance program. Although compliance with the Guidance technically is voluntary, nearly all hospitals and hospital systems make efforts to conform.

Not surprisingly, the OIG identified the federal Anti-Kickback Statute as a risk area for hospitals. In discussions about the Anti-Kickback Statute, the OIG Guidance focused on the relationship between hospitals and physicians.[1] In particular, the OIG commented on compensation arrangements with physicians.

The OIG has provided clarification on certain issues related to arrangements between hospitals and hospital-based physicians. The OIG pointed out that these arrangements present a different set of issues than other compensation arrangements because the hospital, rather than the physician, is in a position to affect the flow of federal healthcare program referrals to the physician.[1] Possible Anti-Kickback Statute violations could include a hospital requiring a physician to pay more than fair market value for the hospital's services or a hospital paying less than fair market value for goods or services provided to the hospital by the physician.[1]

With respect to exclusive contracts for the delivery of various types of hospital-based services, the OIG made clear that such agreements between hospitals and hospital-based physicians can substantially impact the value of the parties' overall arrangement without affecting the value or volume of the hospital's referrals to the physician.[1] Depending on the circumstances, an exclusive contract requiring a physician to perform "*reasonable* administrative or *limited* clinical duties *directly related* to the hospital-based professional services at no or a reduced charge would not violate the anti-kickback statute, provided that the overall arrangement is consistent with fair market value in an arm's length transaction, taking into account the value attributable to the exclusivity."[1] (Author's note: *emphasis appears in original document.)* Such services include:

- Serving on hospital committees,
- Participating in on-call rotation, or
- Performing quality assurance or oversight activities.

However, whether the scope and volume of the services reasonably reflects the value of the exclusivity will depend on the facts and circumstances.[1] Given that the OIG has not provided guidance on this type of arrangement in more than 10 years, these comments are quite significant.[3] The OIG previously called into question arrangements by which a hospital-based physician provides Part A services for little or no compensation in exchange for the opportunity to provide Part B services to hospital patients,[3] but the Guidance indicates the OIG may have changed or at least softened its position.

The Guidance also discussed some legal risks associated with joint venture arrangements (see Legal Corner, *Oncology Issues,* March/April 2005). According to the OIG, hospitals should consider at least the following factors when considering the legality of joint ventures:

- Selection and retention of participants—are they selected or retained based on the value or volume of referrals?
- The structure of the venture—does one party's primary contribution consist of referrals while the other party bears responsibility for nearly all aspects of the day-to-day operation of the venture?
- Financing of investments and the distribution of profits—are investments and distributions proportionate to the returns received?

The OIG recommends that hospitals seek the protection of a safe harbor when structuring joint ventures but provides a list of possible safeguards for hospitals to consider if an arrangement does not fall squarely within a safe harbor. Many of these safeguards have appeared in past OIG Advisory Opinions addressing the legality of specific joint ventures.

The issuance of the Guidance serves as a reminder to all hospitals (and other healthcare providers) that compliance should be an ongoing effort.

## References


[1]Department of Health and Human Services, Office of Inspector General. OIG Supplemental Compliance Program Guidance for Hospitals. *Fed. Reg.* 2005;70(19):4858-4876. Available online at: *www.oih.hhs.gov/fraud/docs/complianceguidance/HospSupplementalGuidance/.pdf.* Accessed March 17, 2005.

[2]Department of Health and Human Services, Office of Inspector General. OIG Compliance Program Guidance for Hospitals. *Fed. Reg.* 1998;63(35):8987-8998. Available online at: *www.oig.hhs.gov/authorities/docs/cpghosp.pdf. Accessed March 17*, 2005.

[3]Department of Health and Human Services, Office of Inspector General. *Financial Arrangements Between Hospitals and Hospital Based Physicians.* Management Advisory Report, No. OEI-09-89-00330. Available online at: *http://oig.hhs.gov/oei/reports/oei-09-89-00330.pdf. Accessed March 17*, 2005.