LEGAL CORNER

OIG Issues Advisory Opinion on Joint Venture Buy-Outs

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The Office of Inspector General (OIG) for the U.S. Department of Health and Human Services has had a longstanding critical view of physician provider joint ventures because, in the "opinion" of the OIG, such arrangements could be used to reward or induce referrals.

On June 21, 2007, the OIG for the U.S. Department of Health and Human Services issued an Advisory Opinion (No. 07-05) that cited potential fraud and abuse issues related to a proposed partial buy-out of a physician-owned ambulatory surgery center (ASC). The OIG concluded that the proposed sale potentially could generate prohibited remuneration under the anti-kickback statute because only a subset of the physicians would receive financial gain. Because the OIG could not conclude that the gain was not related, directly or indirectly, to the value or volume of referrals, the proposed transaction could give rise to possible OIG sanctions.

The proposed arrangement involved a joint venture that owned and operated a multi-specialty ASC. Three members were orthopedic surgeons, two were gastroenterologists, and two were anesthesiologists. The orthopedic surgeons owned a 94 percent equity interest while the remaining members owned a 4 percent equity interest. The orthopedic surgeons (selling members) proposed to sell a 40 percent interest in the ASC directly to a general acute care hospital. The parties certified that the purchase price was fair market value and, because the hospital would invest at a later date, the price per unit exceeded the amount originally paid by the selling members. The facts did not indicate whether any other member or prospective buyer was asked to participate in the arrangement.

The OIG determined that because the price the hospital would pay for the interest exceeded the price paid by the original members, the selling members would receive a higher rate of return on their remaining interest than the hospital would receive on its interest. In the OIG's view, even though each member's return would be proportional to capital invested, the distribution of profits and losses among the remaining members and the hospital would not be directly proportional to each member's capital investment.

It is a criminal offense under the anti-kickback statute to knowingly and willfully offer to pay, solicit, or receive remuneration to induce or make referrals of goods or services that are reimbursable by a federal healthcare program. The statute has been applied in some cases where just one purpose of the remuneration related to referrals. Certain safe harbor regulations exist for payments relating to hospital and physician-owned ASCs. If all of the following conditions are met, any payment representing a return on investment in an ASC (i.e., a dividend or interest payment) will be protected under the safe harbor:

1. The investment must not be tied to past or future volume of referrals, services, or business generated
2. An investor's return on investment must be directly proportional to the amount invested by such investor
3. The hospital is not in a position to influence referrals
4. Any investor physician who could make referrals to the ASC must meet certain additional statutory requirements for physician-owned ASCs.

Because the arrangement did not satisfy all safe harbor conditions, it was unclear that the arrangement was *not* related to referrals. First, the hospital's proposed investment was structured as a purchase of shares directly from the selling members as opposed to an investment in the ASC itself. Second, the net return on the hospital's interest would be less than the net return for the remaining members. Third, because not all members participated in the arrangement, it was possible that one purpose of the arrangement was to reward a few members, namely the selling members, for referrals. While the OIG stated that none of the above factors, taken alone, necessarily gave rise to an anti-kickback violation, it could not say that it did not violate the statute.

This strictly-interpreted view suggests that hospital buy-outs of physician interests in joint ventures may be subject to enhanced scrutiny. So practitioners should consider their personal timelines when deciding whether to invest in a joint venture and should seek the advice of counsel to structure the transaction within the safe harbors. The purchase and sale agreement should include:

- Certain liquidity terms such as a "put" and "call" whereby all members (not just a subset) are able to participate
- An independent appraisal mechanism for third party appraisal
- An affirmative representation by the parties that the transaction is not intended to generate or reward referrals.

If the safe harbor conditions are met and the above steps are taken, these actions lend support to the conclusion that a transaction is not intended to reward or induce referrals.

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