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OSN COMPLIANCE and the Law

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OIG remains reluctant to endorse joint ventures between providers

Agency issues unfavorable opinion against a proposed sale between a hospital and an ASC that is owned by a group of physicians.

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Special to Ocular Surgery News

On June 12, the Office of Inspector General of the United States Department of Health and Human Services issued an advisory opinion that addressed a proposed arrangement between a hospital and a group of physicians relating to the sale of ownership interests in an ASC. The OIG determined that the arrangement could potentially generate remuneration that is prohibited under the anti-kickback statute and declined to issue a favorable opinion.

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The proposed arrangement involves an ASC owned by three orthopedic surgeons, two gastroenterologists and two anesthesiologists. The orthopedic surgeons own 94% of the ASC, and the remaining physicians own 6% of the ASC. The MD investors provide all of the services performed in the ASC.

Under the proposed arrangement, a hospital proposed to purchase from the orthopedic surgeons 40% of the ownership interest in the ASC. The hospital would pay for its ownership interest in the ASC in cash. Because the ASC was an ongoing concern, the hospital would pay more for its ownership interest in the ASC than the orthopedic surgeons originally paid for their ownership interest. Accordingly, the orthopedic surgeons would receive a higher rate of return on their remaining investment in the ASC than the hospital. The orthopedic surgeons did not offer to sell any ownership interest in the ASC to any entity other than the hospital.

Seeking an opinion

The parties sought an advisory opinion from the OIG because the proposed arrangement could potentially implicate the anti-kickback statute, which states that it is a criminal offense to knowingly and willfully offer, pay, solicit or receive any remuneration to induce or reward referrals of items or services reimbursable by a federal health care program. An entity that violates the statute may be subject to criminal and/or civil liability.

The anti-kickback statute and its regulations contain safe harbors that protect certain arrangements from prosecution if the conditions of the safe harbor are satisfied. One of these safe harbors applies to ASCs that are owned by physicians and hospitals. In order to satisfy this safe harbor, the arrangement must meet several requirements, including a requirement that the amount of payment to an investor in return for his or her investment be directly proportional to the amount of that investor's capital investment. The OIG determined that the proposed arrangement did not satisfy the above safe harbor, based on its view that the amount of payment to an investor in return for the investment would not be directly proportional to the amount of the capital investment of that investor. Apparently, the OIG based its opinion on the fact that the orthopedic surgeons would receive a higher rate of return on their investment than the hospital because they paid less for their ownership interest.

The fact that this arrangement did not fit within a safe harbor did not, by itself, mean that the arrangement was unlawful. Rather, the OIG examined the facts and circumstances of the arrangement to determine whether it presented a minimal or more substantial risk of violating the anti-kickback statute.

The OIG determined that the proposed arrangement presented a more than minimal risk of violating the anti-kickback statute. First, the OIG noted that the hospital would make its initial investment in cash, which would not be used to enhance the operation of the ASC. Instead, the orthopedic surgeons would realize this cash payment as a gain on their original investment in the ASC. The OIG indicated that this payment could be viewed as a payment for referrals. Second, because the orthopedic surgeons were the only physicians selling to the hospital, the payment from the hospital to the orthopedic surgeons could be viewed as a payment from the hospital to a subset of physicians whose referrals are particularly valuable. Third, the hospital's payment to the orthopedic surgeons would result in the orthopedic surgeons receiving a higher rate of return on their remaining ownership interest than the hospital would receive on its newly acquired ownership interests. This higher rate of return also could be viewed as a payment to induce referrals.

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> — Alan E. Reider, JD, and Andrew B. Dahlinghaus, JD

Purpose of opinion questioned

Experts in the field have questioned the underlying purpose of this opinion. Although OIG advisory opinions are traditionally conservative in nature, this opinion is particularly disturbing, not for its ultimate position, but for the OIG's articulated rationale. Citing the fact that the hospital would make its investment in cash, thereby benefiting the orthopedic surgeons and not enhancing the operation of the ASC, the OIG raises a concern that would apply to virtually any investment made by a new investor in an ongoing successful joint venture. Further, the OIG's concern that the effect of the orthopedic surgeons selling their interest would be a higher rate of return on their remaining ownership interest than the return the hospital would enjoy, effectively questions any new investment in an ongoing operation. In fact, the only way to cure the OIG's concern would be to establish the sale price at the level of the initial investment, rather than setting it at the current fair market value. Undoubtedly, this conduct would be viewed by the OIG as a serious fraud and abuse violation.

One must question the motivation of the requestor of this advisory opinion. Most requestors will withdraw their inquiry when advised that the decision will be unfavorable. The fact that a negative opinion was issued suggests that the intent here was to receive a negative opinion all along. While, admittedly, this suggestion is pure speculation, the justification articulated by the OIG is so contrary to generally recognized and accepted conduct, that one should be cautious before accepting these statements as a true reflection of risk under the anti-kickback statute. Nevertheless, this opinion does underscore the continued skepticism of the OIG with respect to clinical joint ventures, and any pursuit of joint ventures should be undertaken with care and consideration. OSN

For more information:

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