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Inspector General rejects ASC ownership for nine optometrists

Because the outcome was expected, the question is why the request was made in the first place.

by Alan E. Reider, JD

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A recent advisory opinion issued by the Inspector General declined to approve a proposal for optometrists to participate as owners in three single specialty ophthalmology ASCs. The only question raised by the opinion is why the requestors asked the question.

For many years, the Office of the Inspector General (OIG) has made it clear that it is not in favor of clinical joint ventures where physicians have an equity interest in an entity to which they refer patients. Although the government has acknowledged that such arrangements are not per se illegal, concerns about inappropriate referrals resulting in overutilization and higher Medicare program costs have produced consistent skepticism with respect to such ventures. The sole exception to this presumption lies with ASCs, where the government has acknowledged that ASCs serve as an extension of the physician's practice, and therefore, it is not unreasonable for physicians to have investment interests in ASCs. As a result, the OIG has promulgated regulations creating a safe harbor for physicians who invest in ASCs, as long as certain strict criteria are met. Significantly, those criteria include a requirement that a physician generate a significant portion of his or her revenue from surgery services that may be performed in the ASC.

Many ASCs operate in 'gray area'

Despite the government's limited approval, clinical joint ventures continue to flourish throughout the entire health care industry. Indeed, because of the strict criteria, many ASC ventures do not fall within the safe harbor, but it is generally recognized that unless there is clear abuse in connection with the way in which equity is made available to prospective investors or in which dividends are distributed, the risk of enforcement is relatively limited. These ventures, therefore, exist in the proverbial "gray area," where it is understood that although the government may not be prepared to bless them, absent clear abuse, it will not attempt to impose sanctions.

It is with this backdrop that a request for an advisory opinion was made on behalf of nine optometrists who are members of a group practice with eight ophthalmologists and a nonprofit hospital system. The optometrists wished to join the hospital and the ophthalmologists as owners of the three surgery centers. Not unsurprisingly, the OIG declined to grant a favorable opinion. In presenting its analysis, the OIG stated:

"The optometrists make referrals to the ophthalmologists for treatment of specific eye diseases or injury that is

either identified or suspected. As employees of the group practice, they agree to refer patients for non-inpatient services to group practice facilities or to the surgical center ASCs."

The advisory opinion also noted that "the optometrists are not performing any surgical procedures in the surgical center ASCs."

In its analysis, the OIG pointed to its "longstanding concern about the potential for investments in ASCs to serve as vehicles to reward referrals indirectly." The OIG noted that despite these concerns, it has published a safe harbor for physician-owned ASCs that meet specific criteria. It then pointed out that among the safe harbor criteria is a requirement that each physician owner meet a "one-third practice income test," while other investors must not be in a position to generate referrals to the ASCs or its investors. The OIG observed that ophthalmologists and optometrists are in distinctly different positions; whereas the ophthalmologists perform surgical procedures in the ASC, effectively serving as an "extension of their office practices," the same cannot be said for the optometrists. The OIG concluded that because there is no safeguard to obviate the risk that the investment by optometrists in the surgery center is for the purpose of inducing or rewarding referrals, it cannot conclude that the proposed arrangement poses a minimal risk of fraud and abuse, the standard it uses to approve advisory opinion requests.

Lessons learned

As noted above, one question to be addressed is why the request for an advisory opinion was made, as the outcome was certainly anticipated. One possibility is that the requestors felt that they did not present the typical optometrist-ophthalmologist relationship, as these optometrists are all part of a single group practice with the investor ophthalmologists. Perhaps the government might have concluded that these optometrists' referral patterns were not likely to change as a result of their investment interests, as they already were expected to refer all of their surgery patients to their ophthalmologist partners. Although there may be some logic to that approach, unfortunately the history of the advisory opinion process has demonstrated that the OIG is extraordinarily conservative in granting a favorable result, as it is concerned about approving a scenario that could be misinterpreted and lead to unintended consequences.

There are several lessons to be gleaned from this experience. First, when it comes to clinical joint ventures, any arrangement that falls outside of the existing safe harbor is not likely to gain advisory opinion approval. Second, the OIG continues to take a skeptical view of clinical joint ventures, and those who engage in such ventures must do so carefully. Finally, because the OIG generally alerts a requestor to a negative opinion and affords the opportunity to withdraw the request, one wonders if the purpose of this inquiry was to obtain the negative opinion in the first place. OSN

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