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OIG Advisory Opinion 12-06: A Warning Regarding Impermissible Arrangements between Anesthesiologists and ASCs – But a Warning to Whom?

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On June 1, 2012, the U.S. Department of Health and Human Services, Office of Inspector General ("OIG") issued Advisory Opinion 12-06 (the "Opinion") concerning two proposals by an anesthesia services provider (the "Requestor") for restructuring its relationship with several ambulatory surgery centers ("ASCs"). In concluding that both proposals run the risk of generating prohibited remuneration under the federal anti-kickback statute, the Opinion potentially upends long-standing assumptions concerning permissible ancillary and multi-specialty arrangements.

The Requestor is a sizeable anesthesia group that is the ASCs' exclusive anesthesia services provider. The Requestor independently bills for professional services furnished by its anesthesiologists at the ASCs. The ASCs independently bill a facility fee to all payors to cover the materials and ancillary staff required to operate the ASCs.

Under the first proposed transaction ("Proposal A"), the Requestor would remain the ASCs' sole provider of anesthesia services but would pay the ASCs a per-patient fee, exclusive of federal health care beneficiaries, in exchange for certain management services (e.g., pre-operative nursing assessments, procuring office space, and transferring billing documentation).

In assessing Proposal A, the OIG first reiterated its long-standing distaste for arrangements that "carve-out" payments related to federal health care beneficiaries, noting that such arrangements implicate the anti-kickback statute by "disguising" remuneration from federal referral sources through payments purportedly unrelated to federal health care programs. Since the Requestor would continue to serve as the sole provider of anesthesia services to all of the ASCs' patients, including federal beneficiaries, the OIG found that the carve-out would not save the management fee from constituting improper remuneration. Specifically, by collecting both a management fee from the Requestor and a facility fee from payors, the OIG concluded that the ASCs would be receiving double payments for the same services and therefore would be unduly influenced to keep the Requestor as their exclusive provider of anesthesia services to all patients.

Under the second proposed transaction ("Proposal B"), the ASCs' physician-owners would form wholly owned subsidiaries for the purpose of providing anesthesia services to ASC patients. The subsidiaries would bill for and furnish all anesthesia services, and would contract with the Requestor to provide certain anesthesia-related services (e.g., recruiting personnel and assisting in structuring employment or independent contractor relationships with anesthesia personnel, ordering supplies, quality assurance, providing logistics). The subsidiaries would pay the Requestor a negotiated rate for its services and retain any profits, presumably for distribution to the non-anesthesiologist physician-owners.

The OIG concluded that no anti-kickback law safe harbor would protect the distribution of profits from the subsidiaries to their physician-owners. (Such profits would be a function of the Requestor's anesthesia services revenue resulting from the physician-owners' referrals.) In particular, the OIG found the ASC safe harbor inapplicable because it protects only returns on investments in Medicare-certified ASCs—or entities operated exclusively for the purpose of providing "surgical" services—and anesthesia services are nonsurgical in nature. (See 42 C.F.R. §§ 416.2, 164(c).) In addition, while noting that payments by the subsidiaries to the Requestor, employees or independent contractors could be protected under the personal services, employee, and/or management contract safe harbors, the OIG nevertheless indicated that none of these safe harbors would protect the distribution of profits from the subsidiaries to their physician-owners, as one likely purpose of such distributions would be to generate or reward referrals for anesthesia services.

With no applicable safe harbor, the OIG determined that Proposal B would pose more than a minimal risk of generating prohibited remuneration under the anti-kickback statute. Citing previous guidance, it likened the transaction to a joint venture between "those in a position to refer business" and "those furnishing items or services for which Medicare or Medicaid pays." The OIG found that Proposal B raised many of the red flags previously deemed problematic in its Special Advisory Bulletin on "Contractual Joint Ventures" because the ASCs' physician-owners would be: (i) expanding into a related line of business dependent upon their own referrals; (ii) contracting-out substantially all of the subsidiaries' operations to the Requestor; and (iii) incurring minimal business risk due to their ability to refer business to the subsidiaries. (See 68 Fed. Reg. 23148, April 30, 2003.)

The OIG noted that, unlike the referring party in the 2003 advisory bulletin, the physician-owners here would provide financial and human capital to the subsidiaries. Nonetheless, it still determined that Proposal B presents more than a minimal risk of fraud and abuse because the transaction appears designed to permit the ASCs' physician-owners "to do indirectly what they cannot do directly; that is, to receive compensation in the form of a portion of the Requestor's anesthesia services revenue, in return for their referrals to the Requestor."

The Opinion distinguishes between the entity generating profit and the distribution of such profit to a referral source, even if an owner. Clearly, a *bona fide* group practice can distribute such profit. In other contexts, however, there is inherent risk and a careful review of the applicable facts and circumstances is required. A referring medical practice may be at risk of an anti-kickback violation if it brings a service in-house without assuring that profits are distributed in accordance with the anti-kickback law.

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