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Hospital-Based Physicians under the Kickback Statute: Not Forgotten

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Don't Forget to Include Hospital-Based Physicians when Developing Auditing and Monitoring Plans

The Office of Inspector General (OIG) has been employing the federal anti-kickback statute[1] to various types of arrangements involving physicians due to an enhanced opportunity for abuse in this area. The OIG interest can be aroused whenever there is a flow of benefits to a health care entity from a source in a position to influence referrals of business.

One area that is not commonly thought to implicate the anti-kickback statute involves hospital-based physicians. Over the years there has been very little by way of enforcement action in this arena. In fact, the most definitive outline of the OIG position on this subject goes back to the 1991 OIG Management Advisory Report (MAR) on that subject wherein the agency noted contract arrangements between hospitals and physicians that potentially violate the anti-kickback statute; however, the abuse of these arrangements was found in a flow of benefit *from* physicians to hospitals.

The reasoning was that the referrals of business do not come from physicians, but from hospitals. As such, any remuneration provided in return for the flow of business could implicate the anti-kickback statute. The OIG noted that the statute may be implicated when hospitals require hospital-based physicians to pay more than fair market value for services provided by hospitals.

The OIG referred specifically to requirements for hospital-based physicians to pay a percentage of revenues, such as discussed above, and to other arrangements in which, instead of payment of a portion of fees by the hospital-based physician, the contract required the provision of services that the hospital might otherwise have

to acquire at a market price. The OIG characterized this as when "[a] hospital provides no, or token, reimbursement to pathologists for Part A services in return for the opportunity to perform and bill for Part B services at that hospital."

Although this is an area that has not received a lot of OIG attention, it is not forgotten. The OIG, in its draft *Supplemental Compliance Guidance for Hospitals* in 2004, noted that an arrangement between a hospital and hospital-based physicians might violate the anti-kickback statute if the hospital paid the physicians less than fair market value for their goods or services or required the physicians to pay more than fair market value for the hospital's services.[2]

In the final *Supplemental Compliance Guidance for Hospitals*,[3] the OIG restated its long-held position concerning hospital-based physicians:

> Arrangements between hospitals and traditional hospital-based physicians (e.g. anesthesiologists, radiologists and pathologists) raise some different concerns. In these arrangements, it is typically the hospitals that are in a position to influence the flow of business to the physicians, rather than the physicians making referral to the hospitals.

With the foregoing in mind, notwithstanding the lower level enforcement activity in the area of hospital-based physicians, it would be advisable to include hospital-based physicians when developing compliance auditing and monitoring plans.

Endnotes:

1. 42 U.S.C. 1320a-7b(b).
2. 69 Fed. Reg. 32,012, 32,021–22 (June 8, 2004).
3. 70 Fed. Reg. 4858 (Jan. 31, 2005).