

# The Latest on OIG Physician Arrangement Enforcement Actions

## Testimony Emphasizes the Importance of Auditing and Monitoring All Arrangements Involving Physicians

**O**n February 27, Gregory Demske, assistant inspector general for legal affairs in the Office of Inspector General (OIG) of the Department of Health and Human Services testified before Congress on the subject of OIG enforcement relating to financial relationships involving physicians. The focus related to relationships between device manufacturers and physicians, although the implications are clear for hospitals and others with arrangements with physicians in a position to influence the referral of business.

Demske testified that OIG concerns are aroused whenever a physician's self interest compromises independent judgment, as a result of financial relationships. In such cases the patient faces the risk that the physician is making decisions that are not in the patient's best interest. He further noted that excessive payments to physicians increase health care costs and may result in unfair competition.

Demske reviewed relevant enforcement tools used by the OIG to police improper arrangements involving physicians. One interesting note in the testimony is that Demske stated that the primary tool for enforcement of arrangements with physicians was neither the criminal anti-kickback statute nor the administrative provisions of the Stark laws, but civil enforcement under the False Claims Act. He noted that "the Government may obtain substantial penalties against any person who knowingly submits, or causes the submission of, false or fraudulent claims to the Federal Government."

He further explained that the Act permits filing of *qui tam* lawsuits against those that have defrauded the federal government. He then went on to note other en-



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forcement tools such as the federal anti-kickback statute that makes it a criminal offense to knowingly and willfully offer or pay remuneration to induce the referral of federal health care program business.

What was not elaborated on is the fact that the OIG and Department of Justice (DOJ) are accepting and using allegations of kickback violations as predicates for *qui tam* actions and civil fraud enforcement. In fact, most kickback enforcement actions today are prosecuted as civil fraud cases. The OIG's argument in such cases is that all claims arising from a corrupt arrangement are false and fraudulent, regardless of whether the care was needed and properly administered.

This creates a rather peculiar situation in which a specific intent criminal allegation is acted upon as a civil fraud violation, which is not a specific intent crime, let alone the fact that civil fraud is not a criminal provision at all. The logical extension of using "kickback" situations for fraud enforcement in the administrative arena was also included in the testimony.

Demske stated that the "OIG may also pursue violations of the anti-kickback statute under a provision of the Civil Monetary Penalties Law (CMPL). (See 42 U.S.C. § 1320a-7a(a)(7).) Civil Monetary Penalty (CMP) cases can be attractive alternatives to criminal and civil enforcement for several reasons." CMPL is an administrative alternative to taking cases into the federal court. The cases do not involve the DOJ

and are taken before HHS administrative law judges rather than going through the federal courts.

He cited as an example using CMP to address parties to a kickback scheme regardless of whether anyone actually submits claims. Using the kickback CMP can be useful in cases in which physicians receive remuneration to induce them to influence the flow of business paid for by health care financing programs of the federal government.

Demske noted that in such cases, the CMP remedies in kickback cases include monetary penalties of up to \$50,000 for each act (offer, payment, solicitation, or receipt of remuneration), assessments of up to three times the amount of remuneration, and exclusion from participation in federal health care programs. It is worth noting that the use of CMPL in enforcing kickback arrangements involving physicians is not common in that the False Claims Act has been the more effective enforcement tool with the DOJ backing.

This testimony underscores the importance of compliance officers engaging in auditing and monitoring of all arrangements involving physicians, such as leasing arrangements, medical directorships, medical advisory agreements, et cetera. A great many compliance officers fail to do this in the belief this is the province of legal counsel; however, like all high-risk areas, this should be subject to independent review to verify compliance with applicable laws, regulations, and standards.

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