

OIG Warns Providers to Check Physician Compensation Arrangements

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In this era of intense scrutiny of physician compensation, the Office of Inspector General (“OIG”) issued a significant warning yesterday¹. Physicians' compensation arrangements may violate the Anti-Kickback statute² if even *one* purpose of the arrangement is to compensate a physician for his or her past or future referrals of Federal health care program business.

Recently 12 individual physicians settled with the OIG for improper remuneration for medical directorship arrangements under the Anti-Kickback statute. The improper remuneration included:

- Payments to physicians took into account the physicians' volume or value of referrals;
- Payments to physicians did not reflect the fair market value for the services to be performed; and
- Physicians did not actually provide the services called for under the agreements.

Some of the physicians also received improper remuneration when an affiliated health care entity paid the physicians' front office staff salaries. As an integral part of the scheme, the physicians were subject to liability under the Civil Monetary Penalties Law.

The OIG further cautions that those who commit fraud are subject not only to civil sanctions – such as monetary penalties – but are also subject to criminal and administrative sanctions. Administrative sanctions can include exclusions from Federal health care programs for many years.

How does a physician avoid compensation arrangements (e.g., medical directorships and other personal services contracts) that violate the Anti-Kickback statute? First, compensation arrangements must reflect the fair market value for bona fide services the physicians actually provide. Second, the compensation must not be based on or take into consideration the volume or value of the physician's referrals. Third, if the physician is being paid as an independent contractor, the parties must have a written agreement in place setting forth the relevant terms. If they have not done so, physicians and others should review the OIG's compliance guidance concerning these issues, including its “Compliance Program Guidance for Individual and Small Group Physician Practices”³ and the OIG's “A Roadmap for New Physicians: Avoiding Medicare and

Medicaid Fraud and Abuse.”⁴

In addition to Anti-Kickback statute concerns, physician compensation arrangements will almost always trigger the Ethics in Patient Referrals Act (“Stark”⁵). Accordingly, parties to such arrangements must also ensure that the arrangement fits within a relevant Stark safe harbor. For information about Stark requirements for physician agreements, see our prior Client Alert. Additional state laws may apply to some arrangements.

In the past three years, there have been three OIG Fraud Alerts regarding physician payments.⁶ With the recent settlements by the 12 individual physicians, it is clear that physician payments are of great interest to the OIG. Importantly, not only must physicians be cautious, but health care organizations must also be cautious in entering into physician compensation arrangements since the Anti-Kickback statute applies to those who offer, pay, solicit or receive remuneration for referrals of Federal health care program business.

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¹Fraud Alert: Physician Compensation Arrangements May Result in Significant Liability, June 9, 2015
https://oig.hhs.gov/compliance/alerts/guidance/Fraud_Alert_Physician_Compensation_06092015.pdf

²42 U.S.C. 1302a-7b(b) – Anti-Kickback statute – Criminal penalties for acts involving Federal health care programs. This statute prohibits anyone from knowingly or willfully offering, paying, soliciting or receiving remuneration for referrals of Federal health care program business.

³<http://oig.hhs.gov/authorities/docs/physician.pdf>

⁴http://oig.hhs.gov/compliance/physician-education/roadmap_web_version.pdf

⁵42 USC 1395nn – The Stark Law

⁶Special Fraud Alert: Physician-Owned Entities, March 26, 2013, https://oig.hhs.gov/fraud/docs/alertsandbulletins/2013/POD_Special_Fraud_Alert.pdf and Special Fraud Alert: Laboratory Payments to Referring Physicians, June 25, 2014, https://oig.hhs.gov/fraud/docs/alertsandbulletins/2014/OIG_SFA_Laborator

y_Payments_06252014.pdf Fraud Alert: Physician Compensation Arrangements May Result in Significant Liability, June 9, 2015
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