



Health Care ADVISORY ■

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OIG Flags Physician Compensation Arrangements in Recent Fraud Alert

The U.S. Department of Health & Human Services—Office of Inspector General (OIG) issued a Fraud Alert on June 9, 2015, that underscores its continuing focus on physicians who enter into questionable compensation arrangements with hospitals, nursing homes, dialysis clinics and similar institutional providers.¹ The OIG is increasingly scrutinizing such arrangements to ensure that they reflect fair market value for bona fide services and otherwise comply with the federal Anti-Kickback Statute (AKS). Indeed, the OIG revealed in the Fraud Alert that it recently reached settlements with 12 physicians who received compensation under medical directorship agreements that did not reflect fair market value for the services to be performed. In some instances, the institutional provider also paid the salaries of the physicians' front office staff, which the OIG found to constitute improper remuneration. All of the 12 physicians were subject to liability under the Civil Monetary Penalties Law.

According to Kevin Barry, deputy chief of the Administrative and Civil Remedies Branch of the OIG's Office of Counsel, the OIG is actually hiring additional lawyers to look into taking administrative actions against individual physicians. Barry, speaking at the American Bar Association Health Law Section's Physicians Legal Issues Conference on June 11, 2015, indicated that the new hires will look for the types of questionable payment arrangements discussed in the Fraud Alert issued two days earlier.²

While the OIG's recent Fraud Alert focuses on physicians, the AKS applies with equal force to institutional providers that enter into compensation arrangements with physicians.³ The risk for institutional providers is that OIG investigations of physicians will mushroom into broader investigations of all parties to the arrangements. Institutional providers should take the Fraud Alert as notice that their physician compensation practices may also come under increased scrutiny.

The best defense against an enforcement action is proactive compliance. Providers, for example, can avoid civil

¹ Department of Health and Human Services—Office of Inspector General Fraud Alert: Physician Compensation Arrangements May Result in Significant Liability (June 9, 2015).

² Lisa Schenker, "OIG to More Closely Scrutinize Doctors' Compensation," *Modern Healthcare*, June 12, 2015.

³ See, e.g., U.S. Department of Justice press release: DaVita to Pay \$350 Million to Resolve Allegations of Illegal Kickbacks, October 22, 2014, available at: <http://www.justice.gov/opa/pr/davita-pay-350-million-resolve-allegations-illegal-kickbacks> (last visited June 16, 2015).

monetary penalties by entering into physician compensation arrangements that fit within the “personal services and management contracts” regulatory safe harbor. That safe harbor applies to arrangements that:

- Are in writing and signed by both parties for a term of at least one year;
- Cover all of the services to be provided during the term of the agreement and specify the services that will be provided;
- Delineate the time intervals during which any periodic or sporadic services will be performed and the exact charges for such intervals;
- Set the aggregate compensation in advance, and at fair market value, without taking into account the volume or value of referrals by the physician;
- Involve services that are commercially reasonable (versus counseling or the promotion of the business arrangement); and
- Provide for services that do not exceed those that are reasonably necessary to accomplish their commercially reasonable business purpose.⁴

In addition, facilities that engage physicians to provide services should also:

- Maintain and review time logs or similar documentation of services performed;
- Only engage the number and type of physicians reasonably needed for the facility’s legitimate purposes; and
- Incorporate compensation arrangements with physicians into the facility’s compliance program.⁵

By invoking safe harbors and conforming business practices to OIG guidance, physicians and institutional providers alike can minimize the risk of an adverse enforcement action.

⁴ 42 C.F.R. § 1001.952(d)

⁵ Wade Miller & Kimyatta McClary, “Medical Directorship Arrangements: Increased Government Enforcement and Best Practices for Compliance,” *Compliance Today*, April 2014, at 29.

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