

September 5, 2008

OIG Issues Advisory Opinion re Block Leases

In an [Advisory Opinion](#) issued on August 19, 2008, the Department of Health and Human Services Office of Inspector General (“OIG”) raised concerns about a proposal for a physician practice group to provide space, equipment and personnel to certain other physician practice groups through block leases. The proposal, which was submitted to the OIG by a physician group practice that provides cancer treatment services in a free-standing facility (the “Treatment Group”), called for the Treatment Group to lease to various groups of urologists (the “Urologist Groups”) the space, equipment, and personnel services necessary to perform intensity-modulated radiation therapy (“IMRT”), a common treatment for prostate cancer.

Specifically, each Urologist Group would lease a portion of the space where the Treatment Group provides IMRT services for fixed periods of at least eight hours per week, along with the equipment and personnel necessary to provide the services. In addition, individual radiologists associated with the Treatment Group would enter into contracts with the Urologist Groups to supervise the IMRT procedures. Under the proposed arrangement, the compensation paid by the Urologist Groups would be a fixed amount, set in advance at fair market value pursuant to an independent third party valuation and the Urologist Groups would bill for the services provided, retaining any difference between the fees collected and the amounts owed to the Treatment Group.

Despite the possibility that each individual arrangement could potentially satisfy an applicable safe harbor, the OIG remained concerned that “by agreeing to provide services it could otherwise provide in its own right for less than the available reimbursement, the [Treatment Group] may provide the Urologist Groups with the opportunity to generate a fee and a profit.” Such an opportunity, the OIG concluded, is itself remuneration capable of violating the federal anti-kickback statute. The OIG cited its [1989 Special Fraud Alert on Joint Venture Arrangements](#) and its [Special Advisory Bulletin on Contractual Joint Ventures](#) as evidence of its “longstanding concerns about problematic joint venture arrangements between those in a position to refer business, such as physicians, and those who furnish items or services for which Medicare or Medicaid pays.”

In particular, the OIG’s concerns centered around the following facts:

- While many of the Urologist Groups refer patients to the Treatment Group to undergo IMRT, none of the Urologist Groups currently provide IMRT services as part of their practice or own facilities that provide IMRT services;
- The Treatment Group is in a position to directly provide IMRT services in its own right, billing Medicare in its own name, and retaining all available reimbursement;
- The leased space, equipment and personnel would be used by the Urologist Groups to treat the very same patients they have historically referred to the Treatment Group or other outside suppliers for the same services; and
- On the whole, the Urologist Groups would commit little in the way of financial, capital, or human resources and would assume very little business risk.

Action Steps

This opinion serves as an important reminder that structuring an arrangement in a manner that complies with safe harbors to the federal anti-kickback statute may not be sufficient to ensure compliance with that statute. The arrangement also must be reviewed as a whole to ensure it does not run afoul of OIG concerns regarding contractual joint ventures. For assistance structuring arrangements to comply with the federal anti-kickback statute (or the related Stark Law), please contact any member of the Honigman Health Care Department listed below.

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