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Physician Compensation Arrangements Under the Microscope

On June 9, 2015, the United States Department of Health and Human Services Office of Inspector General (OIG) issued a Fraud Alert titled, "Physician Compensation Arrangements May Result in Significant Liability," focusing on the potential consequences of physician compensation arrangements, such as medical directorships, that violate the Anti-Kickback Statute. The Alert signals that the federal government will carefully scrutinize these arrangements and, moreover, will hold individual physicians directly liable for violations.

The Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), prohibits offering, paying, soliciting or receiving anything of value to induce or reward referrals or generate federal health care program business. Any health care arrangement where anything of value is exchanged with the expectation that the arrangement will result in increased Medicare or Medicaid business must be carefully analyzed to ensure that it does not run afoul of the Anti-Kickback Statute. For example, a medical director arrangement between a health care organization and a physician may potentially violate this law if the physician medical director is being paid in order to induce patient referrals or as a reward for past referrals. Other vulnerable arrangements include professional services agreements for call coverage, grants, equipment and space leases, joint ventures, office staff arrangements, employment relationships, physician recruitment agreements, and honorariums.

In its Fraud Alert, OIG expressly states that compensation arrangements must "reflect fair market value for bona fide services the physicians actually provide." In addition, OIG cautions that even if payment is provided for services that are actually rendered, a compensation arrangement may violate the Anti-Kickback Statute, "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. In a cautionary tale, OIG explains that it recently reached settlements with 12 individual physicians who entered "questionable medical directorship and office staff arrangements." Allegedly, the medical director arrangements included payments that took into account the physicians' volume or value of referrals, compensation that did not reflect fair market value for the services to be performed, and physicians that did not actually provide the services called for under the agreements. OIG also reminded health care providers that relieving a physician of a financial burden constitutes remuneration under the Anti-Kickback Statute.

While Anti-Kickback Statute enforcement actions in the past generally have targeted health care organizations offering or providing the compensation, the Fraud Alert illustrates that physicians are not immune. OIG encourages physicians to carefully consider the terms and conditions of medical directorships and compensation arrangements before entering into them, as it has done in previous guidance. OIG

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best summed it up in “A Roadmap for New Physicians, Avoiding Medicare and Medicaid Fraud and Abuse,” by stating: “In some industries, it is acceptable to reward those who refer business to you. However, in the Federal health care programs, paying for referrals is a crime.”

Noncompliance may result in criminal penalties of fines up to \$25,000 per violation and up to 5 years in prison per violation and civil penalties, under the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a, of \$50,000 per violation and a civil assessment of up to three times the amount of the kickback. In addition, a violation of the Anti-Kickback Statute may result in liability under False Claims Act, which carries significant financial civil and criminal penalties as well.

In light of this Fraud Alert, health care organizations and physicians should carefully review their compensation

arrangements and ensure that they are compliant with the law. Auditing in this area is a multi-step process involving inventorying financial relationships, analyzing and categorizing the types of arrangements, and assessing the risk of noncompliance. Because the Anti-Kickback Statute is an intent-based statute, meaning the act of committing violations must be knowing and willful, a proper review should include a fact-specific inquiry into each arrangement and the circumstances involved. While reviewing physician compensation arrangements for Anti-Kickback compliance, providers should also be sure to note any potential Stark Law violations as well. To the extent that any violations are found, reporting options must be carefully considered and policies and procedures should be established to ensure that compliance strategies are in place to prevent future violations.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.