OIG Fraud Alert Regarding Physician Compensation Arrangements: What You Need to Know

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On June 9, 2015, the Department of Health and Human Services’ Office of the Inspector General (“OIG”) issued a new fraud alert regarding physician compensation arrangements, with a particular emphasis on medical director arrangements. The OIG urged physicians to “carefully consider the terms and conditions of medical directorships and other compensation arrangements before entering into them,” so as to avoid violation of the Anti-Kickback statute.

This Fraud Alert serves as a reminder to physicians that prior to entering into compensation arrangements, they should verify that the payments reflect fair market value for the services provided and are not calculated based on the volume or value of the physician’s referrals of patients covered by a federal healthcare program or other business generated between the parties. This latest fraud alert mentions medical directorships in particular because of the concern that schemes exist to compensate referring physicians improperly through positions that require few actual duties. However, medical directorships are just one type of physician compensation arrangement that could violate the Anti-Kickback statute.

The Anti-Kickback statute is both a civil and criminal statute that prohibits the exchange (or offer to exchange) of anything of value to induce or reward the referral of patients participating in a federal healthcare program. The statute establishes penalties for parties on both sides of the prohibited transaction ranging from a fine per violation of up to $25,000 to imprisonment for up to five years. A successful conviction under the Anti-Kickback statute requires proof that a defendant intended to engage in illegal activity, though not necessarily proof that a defendant knew the activity violated the Anti-Kickback statute specifically.

The OIG has adopted various “safe harbors” to the Anti-Kickback statute, which create a presumption of legality for arrangements that meet their criteria. Structuring physician compensation arrangements to comply with a specific safe harbor — such as the employment or the personal services and management contracts safe harbor — can help ensure that physicians, their employers, and other parties paying for physician services avoid the Anti-Kickback statute’s significant penalties.

Impact on Physicians:

This is the third fraud alert in three years in which the OIG has focused on individual physician behavior. The alert was spurred by settlement agreements the OIG recently reached with 12 individual physicians accused of entering into questionable compensation arrangements. The OIG pointed to three major violations of the Anti-Kickback statute by these physicians: (1) the payments received by the physicians took into account the physician’s volume or value of referrals and the payments did not reflect the fair market value for the services the physicians performed; (2) the physicians themselves did not provide the actual services required under the agreements; and (3) some of the...
physicians had entered into arrangements in which a healthcare entity affiliated with the party paying for the physicians' services also paid the salaries of the physicians' office staff, which constituted additional proper remuneration.

The Fraud Alert puts individual physicians on further notice that compensation arrangements could have Anti-Kickback implications if they are not carefully structured. Because the Anti-Kickback statute is an intent-based statute, issuance of a fraud alert makes proof of intent a smaller hurdle for the government. Physicians should also be aware of the OIG's continuing focus on individual physicians along with large healthcare groups and other healthcare providers. Physicians should thus be careful to structure their compensation arrangements so that they fit within a safe harbor to the Anti-Kickback statute and avoid arrangements that are considered “red flags,” such as bonuses based on patient referrals and certain percentage-based payment arrangements.

Impact on Hospitals and Other Healthcare Providers:

Compensation arrangements in violation of the Anti-Kickback statute implicate both parties to the agreement. As a result, hospitals and other healthcare providers must also ensure that medical director agreements and other physician compensation agreements are structured in compliance with the Anti-Kickback statute. Meeting the requirements of the personal services and management contract safe harbor to the Anti-Kickback statute is one way to avoid liability. Compliance with that safe harbor requires that the contract between the healthcare provider and a physician meet the following requirements:

1. The agreement is set out in writing and signed by the parties.

2. The agreement covers all of the services the physician provides to the principal for the term of the agreement and specifies the services to be provided by the physician.

3. If the agreement is intended to provide for the services of the physician on a periodic, sporadic or part-time basis, rather than on a full-time basis for the term of the agreement, the agreement specifies exactly the schedule of such intervals, their precise length, and the exact charge for such intervals.

4. The term of the agreement is for not less than one year.

5. The aggregate compensation paid to the physician over the term of the agreement is set in advance, is consistent with fair market value in arms-length transactions and is not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties for which payment may be made in whole or in part under Medicare, Medicaid or other federal healthcare programs.

6. The service performed under the agreement do not involve the counselling or promotion of a business arrangement or other activity that violates any state or federal law.

7. The aggregate services contracted for do not exceed those which are reasonably necessary to accomplish the commercially reasonable business purpose of the services.

OIG guidance has also suggested several best practices that providers and hospitals should employ for physician compensation arrangements, including maintaining time logs and other accounts of services performed by physicians, implementing and maintain a compliance program, and ensuring there is a legitimate business justification for any arrangement with a physician.

When entering into a compensation arrangement, both parties must ensure that the physician’s compensation reflects the fair market value of the services provided and is not determined in any way by the number or value of patient referrals. Compensation can include anything of value and is not limited simply to a paycheck. To avoid Anti-Kickback liability, physicians and healthcare providers should carefully structure physician compensation arrangements in such a way that they meet the requirements of an applicable safe harbor.

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