

Advisory Opinion 23-05: OIG Warns Sanctions Would Likely be Issued in Response to Certain Proposed Contractual Joint Venture

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On August 18, 2023, the Office of Inspector General (OIG) published [Advisory Opinion 23-05](#) (Advisory Opinion), in which the OIG warned that it would likely issue sanctions under the Federal anti-kickback statute (AKS) if a proposed contractual joint venture for the provision of certain surgical monitoring services was carried out.

Background

In intraoperative neuromonitoring (“IONM”), a patient’s neurological function is monitored during a surgery that may interfere with those functions. IONM requires two distinct components, a technical component and a professional component. In the technical component, an on-site neurophysiologist sets up and monitors the IONM equipment to make sure it is working correctly. In the professional component, a neurologist monitors the patient’s IONM results continuously throughout the surgery. The neurologist is usually performing this as part of IONM from a remote location.

The entity that requested the Advisory Opinion (“Requestor”) employs neurophysiologists and contracts with a physician practice (“Practice”) to utilize the services of that practice’s neurologists. Currently, the Requestor has contracting arrangements with hospitals and ambulatory surgical centers to perform both the technical and professional components of IONM monitoring. When the Requestor’s services are utilized for a surgery, the Requestor usually bills the hospital or ambulatory surgical center for the technical component, and the Practice bills the payor (either the insurer or the patient) for the professional component.

Proposed Arrangement

The Requestor proposed to collaborate with the surgeons who utilize the Requestor’s services and make referrals to Requestor in the creation of a new turnkey entity owned by the surgeons (Newco). In this new arrangement, the surgeons would have limited participation in the day to day operations and contract directly with the Requestor and the Practice to provide virtually all of the day to day services that would encompass the IONM services, as well as certain billing and administrative services. In exchange for those services, Newco would pay a fee to the Requestor, or the Practice, based on the service performed. It was then proposed that Newco would contract with hospitals and ambulatory surgical centers to provide the technical and professional components of IONM services. It was proposed that the surgeon owners would refer their own patients to Newco and would attempt to not refer federal health care program patients to Newco for IONM services. It was stated, however, that those federal health care program IONM patients would likely still be referred directly to Requestor under the current arrangement.

OIG Analysis

In its analysis, the OIG found that the Proposed arrangement involves forms of remuneration that are prohibited by the AKS. The prohibited forms of remuneration include: (1) discounts provided by the newly formed entity to the Practice for services performed; (2) the newly formed entity potentially paying a lower fee to the Requestor or Practice than what the reimbursement rate is, resulting in profit for Newco; and (3) possible returns on investment interests gained by the surgeons who own Newco.

Though the Requestor notes that it would require that the surgeons not refer patients on federal insurance plans to the newly formed entity, the Requestor also concedes that it has no way of enforcing this. As a result, OIG concludes that these forms of remuneration could potentially induce the surgeons to refer their federally insured patients through the proposed arrangement. The OIG also determined that there is no combination of safe harbor provisions that would protect the proposed arrangement from sanctions. The OIG noted that the proposed arrangement has several hallmarks of suspect contractual joint ventures that have been a longstanding concern of the OIG.

The OIG found that there was potential for significant risk of fraud and abuse due to “patient steering, unfair competition, inappropriate utilization, and increased costs to federal health care programs.” The OIG questioned whether this was a potential arrangement to simply pay the surgeon owners a share of the profits for their referrals and attempt to carve out federal health care business.

Conclusion

The OIG ultimately concluded that there is significant enough risk of fraud and abuse under the Proposed Arrangement to warrant

sanctions under the AKS. In its opinion, the OIG states that this Proposed Arrangement demonstrates many of the ongoing concerns that the OIG has with contractual joint ventures, especially those in which health care providers contract with potential competitors to provide services to their patients. While Advisory Opinions are issued only to the requestors of the opinion and can only be relied upon by the Requestor and parties subject to it, the Advisory Opinion does reaffirm the high risk of fraud and abuse for these contractual joint ventures. It is also notable that market pressure and the “everyone else is doing it” factor actually contributed to OIG’s analysis of a higher risk of fraud and abuse due to unfair competition and improper steering.

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