OIG FRAUD ALERT FOCUSES ON PHYSICIAN COMPENSATION ARRANGEMENTS

By Kylie Mote

On June 9, 2015, the Office of Inspector General (OIG) at the Department of Health and Human Services (HHS) issued a Fraud Alert in which it warns physicians to carefully consider the terms and conditions of medical directorships and other compensation arrangements.[1] While many compensation arrangements are legitimate, the OIG emphasizes that these arrangements can violate the Anti-Kickback Statute ("AKS") if not carefully structured.[2]

Under the AKS, it is illegal to knowingly or willfully 1) offer, pay, solicit, or receive remuneration of any kind, 2) directly or indirectly, 3) in exchange for referring an individual or furnishing or arranging for a good or service, 4) for which payment may be made in whole or in part under any federal health care benefit program.[3] A violation of the AKS is a felony offense that carries penalties of up to five years in prison, significant fines, and mandatory exclusion from federal health care programs.[4] A compensation arrangement may violate the AKS if even <u>one purpose</u> of the arrangement is to compensate a physician for past or future referrals.[5]

The Fraud Alert follows recent settlement agreements between the OIG and 12 individual physicians who entered into questionable medical directorship and office staff arrangements with Fairmont Diagnostic Center and Open MRI, Inc. in Houston, Texas ("Fairmont") and Fairmont's owner Dr. Jack Baker.[6] Specifically, the OIG alleged that the compensation paid to the physicians under the medical directorships constituted improper remuneration under the AKS because 1) the compensation took into account the physicians' volume or value of referrals to Fairmont, 2) the compensation did not reflect fair market value for the services provided, and 3) certain physicians failed to actually provide the services called for under the arrangement.[7] Additionally, the OIG alleged that some of the 12 physicians also entered into arrangements under which Fairmont paid the salaries of the physicians' front office staff.[8] Because this arrangement relieved the physicians of an expense they otherwise would have incurred, the OIG asserted that the salaries paid under the arrangements amounted to improper remuneration to the physicians under the AKS.[9] As a result of the settlement agreements, the OIG collected over

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[1] Office of Inspector General, Fraud Alert: Physician Compensation Arrangements May Result in Significant Liability (June 9, 2015).
[2] *Id.*
[3] 42 U.S.C. § 1320A-7B(B)
[4] *Id.*
[5] *See United States v. Greber*, 760 F.2d 68 (3rd Cir. 1985); *United States v. Borrasi*, 639 F.3d 774 (7th Cir. 2011); *United States v. Davis*, 132 F.3d 1092 (5th Cir. 1998)
[6] Office of Inspector General, Enforcement Actions: Kickback and Physician Self-Referral, *available at* https://oig.hhs.gov/fraud/enforcement/cmp/kickback.asp
[7] *Id.*
[8] *Id.*
[9] *Id.*

$1.4 million in penalties from 11 physicians and excluded one physician from participating in federal health care programs for three years.[10]

In the past, the OIG has largely limited its AKS enforcement actions to hospitals and other institutional providers. This Fraud Alert, and the settlements discussed above, demonstrates that the OIG intends to increase its scrutiny of questionable compensation arrangements by also focusing on the individual physicians who benefit from such arrangements. In light of the Fraud Alert, both institutional providers and physicians should review their existing compensation arrangements to ensure that 1) the arrangements reflect fair market value for the services provided, 2) the arrangements do not take into account the volume or value of referrals, and 3) physicians are actually providing the services called for under the arrangements.

The Fraud Alert can be found on the HHS/OIG website: https://oig.hhs.gov/compliance/alerts/guidance/Fraud_Alert_Physician_Compensation_06092015.pdf

[10] *Id.*