



Client Alert

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OIG Releases Advisory Opinion No. 08-10: Contractual Joint Ventures Scrutinized

On August 26, 2008, the Office of the Inspector General (“OIG”) of the Department of Health and Human Services (“DHHS”) published Advisory Opinion 08-10, in response to a physician group’s proposal to provide space, equipment, and personnel to other physician practices through block leases for the provision of intensity-modulated radiation therapy (“IMRT”). The OIG determined that such an arrangement could potentially generate prohibited remuneration under the Anti-kickback Statute (“AKS”) and could constitute grounds for the imposition of exclusion or civil monetary penalty sanctions, pursuant to sections 1128(b)(7) and 1128A(a)(7), respectively. This guidance could have far-reaching implications for similar joint venture arrangements.

In the scenario scrutinized, the Requestor is a physician group practice providing cancer treatment services, including IMRT, which is frequently used to treat prostate cancer. Patients with prostate cancer who receive IMRT at the Requestor’s free-standing facility are referred there by urologists. A number of the urologists practice in physician groups in the area. The Requestor proposed to enter into an arrangement with a number of these urologist physician groups (“Urologist Groups”), whereby the Urologist Groups would lease, on a part-time basis, the space, equipment, and personnel services necessary to perform IMRT. Specifically, each Urologist Group would lease examination and treatment rooms at the Requestor’s facility for fixed periods of at least eight hours per week, in the same space where the Requestor performs IMRT, as well as equipment and personnel necessary to provide patients with IMRT. In addition to space, equipment and personnel, the Requestor would provide the Urologist Groups with radiation supplies and billing services. In exchange, the Urologist Groups would pay the Requestor premises rent, equipment rent, personnel expenses, and communication and administrative expenses. Compensation under these arrangements would be for fixed amounts set in advance, and certified fair market value by an independent third party. Lastly, individual radiologists associated with the Requestor who normally performed services billed by the Requestor would enter into contracts with the Urologist Groups to supervise the IMRT procedures, as independent contractors for the Urologist Groups.

In terms of billing, the professional and technical components of IMRT would be billed to Medicare using billing numbers assigned to the Urologist Groups. The Urologist Groups would pay the amounts owed under the agreements

with Requestor, regardless of the number of patients referred to the facility and regardless of whether the Urologist Groups collected fees for the procedures from Medicare or other payors. The Urologist Groups would retain the difference between the fees collected and the amounts owed under the agreements with the Requestor and the radiologists.

In its analysis, the OIG notes that the series of agreements that would make up the proposed arrangement, in effect, would establish a joint venture between the Requestor and the Urologist Groups. The OIG has designated these types of arrangements “contractual joint ventures” and describes them as “questionable contractual arrangements where a health care provider in one line of business (the “Owner”) expands into a related health care business by contracting with an existing provider of a related item or service (the “Manager/Supplier”) to provide the new item or service to the Manager/Supplier’s existing patient population, including federal health care program patients.” Since the release of a Special Fraud Alert on Joint Venture Arrangements in 1989, the OIG has expressed concerns about such arrangements, due to the potential for referral-based remuneration, and this case is no different. The OIG goes so far as to liken the Requestor’s proposal to a proposed arrangement described in the OIG’s 2003 Special Advisory Bulletin on Contractual Joint Ventures, wherein the OIG noted, “The Manager/Supplier not only manages the new line of business, but may also supply it with inventory, employees, space, billing and other services. In other words, the Owner contracts out substantially the entire operation of the related line of business the Manager/Supplier—otherwise a potential competitor—receiving in return the profits of the business as remuneration for federal program referrals.”

To support its determination that there is significant risk that arrangement proposed by the Requestor would be an improper contractual joint venture that would be used as a vehicle to reward the Urologist Groups for their referrals, the OIG observes that the Urologist Groups would be committing very little in the way of financial, capital or human resources to the IMRT and, accordingly, would assume very little business risk, yet would receive a share of the IMRT profits (i.e. the difference between the reimbursement received by the Urologist Groups from the Federal health care programs and the rent and fees paid by the Urologist Groups to the Requestor and the radiologists). “The opportunity to generate a fee...” the Opinion cautions, “...is itself remuneration that may implicate the AKS.” The OIG also references additional problematic elements of the proposed arrangement, that it referenced previously in its 2003 Special Advisory Bulletin, including: (1) the Requestor is in a position to directly provide and bill for the service in its own right and would otherwise be a competitor for the Urologist Groups for the provision of IMRT; (2) the Urologist Groups would use the premises, equipment and staff of Requestor to serve a patient base that has been referred historically to the Requestor or other suppliers for the same services; (3) the aggregate income to the Urologist Groups would vary with referrals from the Urologist Groups to the facility, and, because the various agreements could be tailored to fit the historical pattern of referrals by the Urologist Groups, so might the income of the Requestor; and (4) all parties would share in the economic benefit of the IMRT.

The Opinion concludes that the proposed arrangement potentially could generate prohibited remuneration under the AKS and the OIG potentially could impose administrative sanctions on the Requestor in



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connection with the arrangement, although any definitive conclusion regarding the existence of an AKS violation would require a determination of the parties' intent, which the OIG finds to be beyond the scope of the advisory opinion process.

If your organization is involved in any arrangement that shares qualities with the proposed contractual joint venture above, we recommend that you reevaluate your arrangement with healthcare counsel and take steps to alter it to limit or exclude the indicia associated with suspect contractual joint ventures.

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