



Client Alert

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OIG Advisory Opinion Cautions Against Percentage Fee Arrangements and Management Services, Takes Expansive View of Marketing

The Department of Health and Human Services, Office of Inspector General (OIG) recently issued Advisory Opinion 11-17 (issued November 16, 2011, posted November 23, 2011) in response to a request by a company (the Requestor) that proposed to provide allergy testing and immunotherapy management services to primary care physicians (the Physicians). The OIG ultimately determined that the arrangement could potentially pose a substantial risk of violating the Anti-kickback Statute, subject to the requisite finding of intent.

Under the proposed arrangement, the Requestor would provide personnel, equipment, supplies, training and billing and collection services on an as-needed basis for all allergy services provided by the Physicians. The Requestor would also provide printed patient education materials and would review the Physicians' patient files to identify patients potentially appropriate for allergy testing and immunotherapy services. Such management services would all be provided to the Physicians on an exclusive basis. The Physicians would provide space within their offices to operate the laboratory, administrative staff, medical supplies and furniture, appropriate general liability and medical malpractice insurance, and physician supervision and interpretation of the test results and in-office administration of immunotherapy (allergy shots).

The Physicians would bill federal healthcare as well as third-party payors, under the Physicians' own provider numbers. As noted above, as part of the services provided, the Requestor would provide billing and collection services for the Physicians' newly offered allergy services. In return for the services provided, the Physicians would pay the Requestor 60 percent of the Physician's gross collections from allergy testing and immunotherapy items and services. None of the Physicians have an ownership interest in the Requestor.

Although there may have been no referral of patients in the traditional sense of referral under federal Anti-kickback analysis, the OIG found that the statute nonetheless was implicated because it viewed two aspects of the arrangement as involving "recommending or arranging" for services reimbursed by government programs. Specifically, the OIG stated that the management company's provision of print materials to be provided by the Physicians in their offices, and the review of patient files by personnel supplied to the physician by the management company, constituted marketing and thus involved "recommending and arranging" for services. This interpretation of marketing

represents a significant expansion of what the OIG has previously deemed to fall within the concept of marketing, and is perhaps the most noteworthy aspect of the Advisory Opinion. While marketing services have in past advisory opinions been deemed to implicate the Anti-kickback statute, heretofore those marketing activities have involved direct patient communications, negotiation of payor agreements and “white-coat” marketing rather than the passive activities flagged by the OIG in this opinion.

The OIG then went on to note that the arrangement would not satisfy the personal services or management contracts safe harbor because: 1) the services would be provided on a sporadic basis and thus there was no way to specify the service intervals (the safe harbor requires that the parties agree upon a definite schedule within the agreement); and 2) the aggregate charges for the Requestor’s services could not be set in advance (the safe harbor requires that the aggregate fees/payments are fixed in advance).

Failure to satisfy a safe harbor does not render an arrangement a *per se* violation of the Anti-kickback Statute. The OIG has previously found arrangements that do not satisfy a safe harbor may not necessarily pose a high risk under the Anti-kickback Statute; however, the scenario presented by the Requestor was deemed to pose a significant risk under the Statute.

Two of the key elements of the arrangement that appeared to provide the OIG with significant concern were: 1) the failure of the percentage fee arrangement to be specifically tied to the actual services provided by the Requestor; and 2) the use of personnel provided by the management company to review the Physician’s charts and identify patients who may be suitable for allergy services.

Percentage compensation arrangements, although common throughout the healthcare market, have long been viewed negatively by the OIG.¹ In this instance the Requestor stated that the fee was reflective of a fair market value for the services rendered. By its very design, a percentage fee arrangement relates to the volume or value of the business generated between the parties. Parties contemplating similar arrangements would be well advised to consider removing the percentage fee formula from the arrangement especially where any services which could be deemed “marketing” under the OIG’s expansive definition applied here, or instituting safeguards which might protect the arrangement from perceived abusive scenarios (e.g., compensation caps, declining fee arrangements, flat fees for specific services). Compounding the concern over the fee arrangement were the Requestor’s marketing efforts. Though the ultimate decision of whether to test for allergies may have been the Physician’s,² the Requestor’s review of patient charts and identification of patients potentially appropriate for allergy testing services created, in the OIG’s view, an unacceptable risk of overutilization.

While an Advisory Opinion has limited application only to the requesting party, it nonetheless provides important insight into the application of the Anti-kickback Statute to specific aspects of management services

¹ See, e.g., Advisory Opinion 98-4, but see Advisory Opinion 09-17 in which a percentage fee was not deemed to present an unacceptable level of fraud and abuse risk.

² The OIG noted that it was concerned that, because the Physicians did not have significant specialized allergy services / treatment experience, they would be unduly influenced by the Requestor’s staff (a non-physician) and more likely to order unnecessary services.



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arrangements. Where many physicians search for opportunities to expand their in-office services through the use of third party management companies, this Advisory Opinion should give both physicians and service providers concern. In particular, services arrangements with marketing features (even passive ones such as reviewed here) utilizing percentage fee arrangements with marketing components should be reviewed in light of this Advisory Opinion.

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