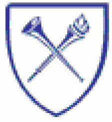

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OGC Advisory*

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TOPIC: New Guidance on Health Care Contractual Joint Ventures

The Office of Inspector General (OIG) of the U.S. Department of Health and Human Services issued a Special Advisory Bulletin on April 23, 2003, which is raising serious concerns throughout the health care industry about the legality of a variety of provider joint ventures, now broadly defined to include any "contractual arrangement between two or more parties to cooperate in providing services." This General Counsel Advisory is intended to assist in recognizing arrangements that the OIG may view as "problematic" and offer guidance in the appropriate treatment of such arrangements.

Suspect arrangements typically involve a health care provider (Provider) expanding into a related service line by contracting with an existing provider of that service (Supplier) to serve the Provider's existing patient population. In the OIG's view, this type of arrangement means that the Provider is contracting out the entire operation of a related line of business to a subcontractor who would otherwise be a competitor. The OIG asserts that the Provider's share of the profits from the new venture constitutes "remuneration" for the referral of the Provider's Medicare/Medicaid patients, and thus may violate the Medicare Anti-Kickback Statute. Violation of this statute constitutes a felony. Even if the arrangement is structured so that it meets the one or more of various applicable Safe Harbor Regulations, the OIG now states that the arrangements may still be illegal because the Supplier "is providing the Provider with the opportunity to generate a fee and profit (and the) opportunity to generate a fee is itself remuneration that may implicate the Anti-Kickback Statute."

As an example of problematic arrangements, the OIG cites a hospital entering into a new venture with an existing durable medical equipment company where the joint venture primarily serves hospital patients. Another example involved a group of nephrologists forming a joint venture with an existing home dialysis supply company to operate a new company to sell supplies to the nephrologists' dialysis patients.

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The OIG explains that “problematic arrangements” of this sort typically have certain common elements, including:

> *New Line of Business.* The Provider seeks to expand into a related line of business that can serve the Provider’s existing patient base.
>
> *Captive Referral Base.* The new venture predominantly or exclusively serves the Provider's existing patients.
>
> *Lack of Business Risk.* The Provider's primary contribution to the new venture is referrals. It does not operate the new business, nor does it commit substantial financial, capital or human resources. Instead, virtually all of the operations of the new business are provided by the Supplier, while the billing of insurers and patients is done in the name of the Provider.
>
> *Supplier is Competitor.* The joint venture partner selected by the Provider is an established Supplier of the same services as those to be offered by the new venture. In other words, the Supplier would be a competitor for the new line of business.
>
> *Shared Benefit: Remuneration.* The Provider and the Supplier share the economic benefit of the new business. The practical effect is that the Provider has the opportunity to bill for services that would otherwise be provided independently by the Supplier.
>
> *Volume or Value.* The aggregate payments to the Supplier will typically vary with the volume or value of business generated for the new venture. Likewise, the remuneration to the Provider (profits from the venture) also varies based upon the Provider's referrals to the new business.
>
> *Exclusivity.* The parties may agree to a non-compete, barring the Provider, the Supplier, or both from offering the products or services of the new venture to Provider's patients other than through the new venture.

Of these factors, the "lack of business risk" is likely the most important. In describing suspect arrangements, the Advisory emphasizes ventures in which the Provider is not actively involved either as an investor or as an operator. In these situations, the OIG views the financial benefits of the venture to the Provider not as a return on investment or labor, but as a kickback for patient referrals.

The OIG characterizes the above-listed factors as “illustrative, not exhaustive,” and reiterates that the April 23 Advisory does not describe the entire universe of suspect contractual joint ventures. The Advisory is particularly troublesome because it identifies as problematic ventures that are relatively common in the industry.

What the Advisory does not fully address is the level of risk associated with ventures that have some, but not all, of the suspect attributes. It also may be difficult to determine what level of involvement by the Provider in the operations or business risk of the new venture would be sufficient to avoid being characterized as suspect. These issues may be clarified over time by either policy statements or enforcement actions.

The Special Advisory Bulletin is not the first word from the OIG on the subject of joint ventures. The 1989 Fraud Alert on joint ventures, as well as the Anti-Kickback safe harbor for small investments, illustrates the ongoing interest of the federal regulators in provider joint ventures. The Advisory's most significant implication is what it suggests about enforcement policy: it may signal the OIG's intention to be more aggressive in pursuing suspect joint ventures (which now have been expanded by definition to include "any contractual arrangement") under the Anti-Kickback Statute. Although the Special Advisory Bulletin is a guideline and is not the law, it is a clear indication of how the OIG interprets the Anti-Kickback Statute. Any existing or contemplated joint ventures or contractual arrangements involving related lines of business should be carefully analyzed in light of this Special Advisory Bulletin.

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