



Health Law Alert: OIG Issues Historic Advisory Opinion 10-15 Granting Approval of Multi-specialty Physician-Health System Joint Venture

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Gray Plant Mooty Attorneys Play Key Role in Securing OIG Approval in Groundbreaking Advisory Opinion Addressing Anti-Kickback Statute

In a first-of-its-kind advisory opinion, the Office of Inspector General (OIG) has granted Anti-kickback Statute approval of a multi-specialty joint venture between a physician group and health system. While the OIG has been issuing Anti-kickback Statute advisory opinions since 1997, Advisory Opinion 10-15 marks the first time a multi-specialty joint venture has been permitted where both the health system and physician group owners are referral sources for, and will be making referrals to, the joint venture. Advisory Opinion 10-15 will be published on the OIG Web site within the next week. Gray Plant Mooty attorneys Jennifer Reedstrom Bishop and Jesse Berg were central to securing Advisory Opinion 10-15 on behalf of their clients.

Background on Joint Venture at Issue in Advisory Opinion 10-15

Advisory Opinion 10-15 involves a new ambulatory care center (the ACC) to be owned in equal shares by two nonprofit, tax exempt corporations: a health system that owns the teaching hospital for a major state university medical school and the physician group that is the medical school's sole faculty practice plan. The ACC is part of a university campus-planning process to more efficiently and effectively deliver innovative care in a congested urban area, while affording increased opportunities for education and research.

Under the joint venture, the health system and physician group will contribute clinics and intangible assets to be co-located in the ACC, including clinics in the following areas: imaging, orthopedics, ophthalmology, physical therapy, surgery, and oncology, among a number of others. In addition to housing these and other clinics, the ACC would include space for research, administrative, and teaching activities. The clinics to be contributed are currently scattered throughout locations on the hospital's campus and are located in facilities originally built to treat a much smaller number of patients than they currently serve. The physician group, health system, and medical school are parties to a wide variety of agreements with each other, including professional services agreements, management agreements, and various agreements related to research and education. The health system employs over 600 physicians and the physician group employs more than



800 physicians. While neither party has physician owners, the physicians currently refer patients, including Medicare beneficiaries, to each other for various services.

Traditional OIG Analysis of Joint Ventures Under Anti-kickback Statute

The OIG has always expressed serious concerns that joint ventures between referral sources pose high risks of inducing referrals in violation of the Anti-kickback Statute. The Anti-kickback Statute makes it a crime to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals for services reimbursable under federal health programs, including Medicare and Medicaid. Although the OIG has occasionally approved physician-hospital joint ventures in past advisory opinions, these other ventures have been far more limited in scope than the joint venture in Advisory Opinion 10-15 and have typically involved ventures where the potential for referrals is not especially pronounced, such as ambulatory surgery centers or arrangements involving radiologists.

On its face, the joint venture implicates the Anti-kickback Statute because both the health system and physician group are in a position to refer, and will be referring to, the ACC. While one Anti-kickback Statute "safe harbor" was potentially relevant to the arrangement, the ACC could not qualify. Under this safe harbor, no more than 40 percent of the ownership in an entity can be held by parties in a position to refer to the entity and no more than 40 percent of the entity's health care revenue can come from business the owners generate. Because both the health system and physician group will refer to—and generate revenue for—the ACC, 100 percent of the owners of the ACC will be in a position to refer and the safe harbor could not be used.

Application of Anti-kickback Statute in Advisory Opinion 10-15

Nevertheless, the OIG concluded that the ACC did not violate the Anti-kickback Statute. In so doing, the OIG noted that "[o]rdinarily, joint ventures with 100 percent interested owners pose a significant risk of fraud and abuse," but that "based on the totality of facts and circumstances," the arrangement would not violate the Anti-kickback Statute. The OIG discussed the following factors as central to its decision:

- The physician group and health system are components of an academic medical center with longstanding relationships integrating their clinical, research, and teaching missions. The ACC will enhance the ability to further these missions by streamlining resources, better accommodating patients, and permitting greater access to educational opportunities for students and residents.
- The parties are making equal contributions to the ACC. Neither party is loaning funds to, nor guaranteeing any loans for, the other party. Any profits or losses will be shared proportionally in accordance with their ownership interests.
- A qualified appraiser was engaged to conduct a fair market value analysis of the assets to be contributed to the ACC.



- All physicians receive compensation for the services they provide in accordance with applicable exceptions to the Stark Law and in a manner that complies with the Anti-kickback Statute. No physicians receive ownership distributions or profit shares from the ACC, health system, or physician group.
- There is no requirement for physicians to refer to the ACC and the ACC does not track referrals. The ACC will have a policy in place under which patients are referred elsewhere if medically necessary, required by insurance, or if the patient prefers a different location.
- While the requestors have a variety of other business arrangements in place, all of those arrangements were represented as complying with the Anti-kickback Statute and Stark Law.

What Does the Future Hold?

Securing advisory opinions is a notoriously complex and mysterious process, especially where joint ventures between referral sources are involved. In granting approval in Advisory Opinion 10-15, the OIG cautioned, "[w]e emphasize that a similar arrangement with different facts and circumstances might lead to a different conclusion." It is, of course, notable that this joint venture involves academic medicine and that all of the parties are nonprofit, tax-exempt entities. However, the OIG indicated informally that those factors would not have been enough to receive a positive result. It appears that key to the success in obtaining the opinion was the scope of the project, the demonstrated need for the new facility, and longstanding academic affiliation between the parties.

With the new emphasis on integration between physicians and health systems as a result of the financial incentives created by the Patient Protection and Affordable Care Act, the roadmap to complying with the Anti-kickback Statute outlined in Advisory Opinion 10-15 may prove valuable to parties considering joint ventures in the future.

Questions?

Jennifer Reedstrom Bishop is the chair of the Health Law practice group at Gray Plant Mooty and Jesse Berg is a principal in the Gray Plant Mooty Health Law practice group. If you have questions about Advisory Opinion 10-15 or the advisory opinion process, please do not hesitate to contact Jennifer at 612.632.3060 (jennifer.bishop@lathropgpm.com) or Jesse at 612.632.3374 (jesse.berg@lathropgpm.com).

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