

Health Law Alert: Recent Enforcement Actions and OIG Fraud Alert Highlight Regulators' Focus on Physician Compensation Arrangements

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In the past year, we have seen several new indications of the importance federal regulators are placing on compliance with Stark Law and Anti-Kickback Statute rules on physician compensation.

First, a 2014 False Claims Act settlement appears to be the first time that the Department of Justice (DOJ) intervened in a Stark Law action based on allegations that compensation *within a physician group practice* violated the law. Stark Law enforcement actions in the past have almost always involved payments from larger entities, typically hospitals, to physician referral sources.

Second, the Department of Health & Human Services Office of Inspector General (OIG) issued a Special Fraud Alert earlier this summer indicating that it has increased its focus on physician compensation arrangements. The particularly compelling point about the OIG's alert is that it suggests a focus on compliance by physicians individually, as opposed to just the hospitals and organizations with which they contract.

The OIG Fraud Alert

The Alert is short and to the point: physicians who enter into compensation arrangements must ensure that those arrangements reflect fair market value for bona fide services the physicians actually provide. The Alert follows twelve OIG settlements with individual physicians involving medical director and other compensation arrangements. The OIG alleged that these arrangements constituted improper remuneration under the Anti-Kickback Statute because they:

- Took into account the physicians' volume or value of referrals;
- Did not reflect fair market value for the services to be performed;
- Compensated physicians for services they did not actually provide; and
- Relieved physicians of financial burdens they would have otherwise incurred.



In each of these cases, the OIG questioned the physicians' involvement and determined that the physicians were an integral part of the scheme and were therefore subject to liability under the Civil Monetary Penalties Law. Simply put, the contracting organizations were not the only subject of investigation.

The OIG warns that physicians should "carefully consider the terms and conditions of medical directorships and other compensation arrangements before entering into them." Should compensation violate the Anti-Kickback Statute, physicians can be held personally liable—both civilly and criminally.

Stark Law Settlement Based on Violation of In-Office Ancillary Services Exception

The 2014 DOJ settlement against the New York Heart Center, a relatively small physician group practice (nine physicians), requires the group to pay \$1.3 million to resolve allegations that compensation to its physicians violates the Stark Law. The False Claims Act case alleged that the cardiology group failed to meet the "in-office ancillary services" exception (the "In-Office Exception") due to the compensation formula that the group used. The In-Office Exception is commonly used by group practices because it offers more flexibility for paying physicians than other Stark Law exceptions, such as the exception for "bona fide employment relationships." For example, unlike the bona fide employment exception, the In-Office Exception does not include "fair market value" as a standard that must be met. According to the DOJ, the group compensated its physicians in a way that improperly took into account their referrals for in-office imaging services (CTs and nuclear medicine procedures).

This settlement is significant for several different reasons. First, this is the first reported instance of the DOJ intervening in a False Claims Act case that was premised on a physician group's internal compensation arrangement. While these arrangements have largely escaped scrutiny in the past, that trend may be changing. Importantly, the In-Office Exception (and the "group practice" definition which must be met to qualify for the exception) are quite complex and can present challenges, particularly where a group sells services to other provider entities, involves independent contractor physicians as part of the group or uses an internal formula that falls outside of one of the regulatory "deeming" rules (for payment that is "deemed" not to take into account the volume or value of referrals). Second, the DOJ has tended to focus its enforcement efforts in the past on hospitals, health systems and other larger organizations that were generally perceived as having deep enough pockets to pay for referrals. Now, however, it appears that the activities of individual physicians are likely going to be on the regulators' radar.

What Should Physicians and Organizations Do Now?

The message from these two matters should not be taken lightly. Regulators appear to be shifting at least some of their attention to the activities of individual physicians and smaller practices. Not only did the OIG pursue individual physicians involved in questionable compensation arrangements, but the OIG also



publicized these investigations and the OIG's increasing focus on compensation arrangements in a fraud alert, putting the industry at large on notice. Meanwhile, the prevalence of False Claims Act *qui tam* relators, and the legions of lawyers who file cases on their behalf, raise the stakes for compliance.

While the alert signifies an increasing pursuit against individual physicians, it also serves as a reminder to contracting organizations, generally. Physicians and organizations alike must tread cautiously when entering into compensation arrangements and be sure that the arrangement complies with federal requirements. Health care providers should review old and new arrangements to ensure that they reflect fair market value, do not take into account the volume or value or referrals, and compensate physicians for services actually performed. Under the one-purpose test, a seemingly legitimate arrangement violates the Anti-Kickback Statute if just one purpose of the arrangement is to compensate a physician for past or future referrals. Group practices and their physician owners, employees and contractors should also be aware that their compensation formulas may be subject to scrutiny in the future. While there is flexibility under the In-Office Exception, it is extremely technical and requires continued monitoring to ensure that its numerous elements continue to be satisfied.

[Click here to view the OIG Fraud Alert.](#)

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