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COMPANY MODEL KICKBACKS IN THE HOSPITAL SETTING

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In an article last August (OIG Disapproves Two Referral Arrangements as Kickbacks), I addressed the issue of kickbacks disguised as management fees and in the form of the so-called "company model."

Those arrangements, which began in the anesthesia but which are by no means limited to it, originated in the outpatient facility setting.

Prior to the formation of the "company," specialty services are provided by physicians for their own, or their group's, account. After formation, only those specialists who become employed or subcontracted remain, with a significant share of the fees redirected to the company model's owners, the referring physicians.

In the management fee model, specialists are charged a “use” fee, are charged for normal services rendered by the facility’s staff, or are charged for the “rent” of space within the facility. Despite the fact that the Department of Health and Human Services’ Office of Inspector General (“OIG”), the federal agency charged with regulating and enforcing the Federal Anti-Kickback Statute (“AKS”) declined to approve those models in a 2012 Advisory Opinion (Opinion 12-06), it appears as if the company model is expanding from the outpatient setting into the hospital setting.

For example, the hospital, in the context of a renewal of a group’s exclusive contract, grants a carve out, either immediate or contingent (in other words, an option) in favor of a referring physician, “Dr. Jones,” or his group. Dr. Jones is permitted, pursuant to the terms of the carve out, to use an entity to engage his own specialists. Sometimes, the existing group is given a right of first refusal or first negotiation to allow it to try to come to terms with Dr. Jones to provide those services.

Under that arrangement, Dr. Jones is able to purchase the services at a wholesale rate, thus being able to profit from the difference between wholesale and retail.
Note that there is an additional, extremely serious compliance issue presented here: Is the hospital’s award of the carve out to Dr. Jones itself a kickback to induce referrals? That is, is the contractual right in favor of either of Dr. Jones itself remuneration in violation of the AKS?

Here are few of the steps that radiology groups can take to deal with this threat.

- Shore up your relationships with hospitals, referring physicians, and patients, bringing the level of your performance to *Experience Monopoly* status. This raises the "expense" of losing your group's services in light of a company model or management fee proposal.
- Don't accept carve out provisions in your exclusive contract.
- Learn to articulate that the economics of company model carve outs impact the entire financial arrangement underlying the exclusive contract.
- If your group is approached in connection with any deal – a company model deal or a management deal or anything similar or dissimilar – you want to push to obtain an advisory opinion from the OIG.

As the economics of health care become more acute, it's likely that more in the position to refer will attempt, legally or illegally, to profit from those referrals in both the outpatient and inpatient setting.

Although the issue is contentious and although Advisory Opinion 12-06 denied regulatory approval to those specific company model and management fee proposals, the issue is far from settled as more and more referring physicians and facilities are attempting to plan around the opinion.

You have to start now to develop your particular strategy and your particular tactics to block likely attempts, even before anyone has any real plans to put the economic screws to your practice.

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