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# Inspector General Weighs In on Fee Sharing

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In a much-awaited pronouncement, the U.S. Department of Health and Human Services' Office of Inspector General (OIG) in June issued Advisory Opinion 12-06 addressing the propriety of two popular schemes to extract money from anesthesiologists, the so-called "company model" and the "management fee."

The advisory opinion could not be more welcome, as in the approximately 1.5 years since my article, "The Company Model: Is Taking Less Money To Work at a Surgicenter Worth Jail Time?" (*Anesthesiology News*, January 2011), was published, the pace at which surgeons and ambulatory surgery centers (ASCs) are exploiting the company model appears to be accelerating.

To draw once again on the analogy used in that earlier article, just as Willie Sutton, the bank robber, targeted banks "because that's where the money is," owners of ASCs continue to seek a share of anesthesia fees.

**The Company Model Business Model**

In its most direct form, the company model involves the formation, by the surgeon-owners of an ASC, of an anesthesia services company to provide all of the anesthesia services for the center. Before the formation of the company, all anesthesia services were provided by anesthesiologists either for their separate accounts or for the account of their anesthesia group. After the formation of the company, anesthesiologists are employed or subcontracted, with a significant share of the anesthesia fee being redirected to the company model's owners, the surgeons.

**Management Fee Model**

In the management fee model, the ASC charges the anesthesiologists a fee for use of portions of its facility, or for services and other overhead required in the context of serving the facility's patients.

**Key Compliance Issues**

The federal anti-kickback statute (AKS) prohibits the transfer of anything of value for referrals. State laws differ, but generally contain similar provisions barring remuneration for referrals. This article focuses on the federal concepts applicable to patients covered under Medicare and Medicaid.

Courts have interpreted the AKS to apply even when an arrangement may have many legitimate purposes; the fact that one of the purposes is to obtain money for the referral of services or to induce further referrals is sufficient to trigger a violation of the law.

Certain exceptions, known as "safe harbors," define permissible practices not subject to the AKS because regulators believe they are unlikely to result in fraud or abuse. The failure to fit within a safe harbor does not mean that an arrangement violates the law; there's just no free pass.

The question for the company model or for management fee deals, then, is whether the arrangement runs afoul of federal anti-kickback law. Each deal must be analyzed carefully.

**Prior OIG Guidance**

The OIG previously issued two fraud alerts applicable to the analysis of company model deals: its 1989 Special Fraud Alert on Joint Venture Arrangements, which was republished in 1994, and a 2003 Special

Advisory Bulletin on Contractual Joint Ventures. The OIG considers a “joint venture” to mean any arrangement, whether contractual or involving a new legal entity, between parties in a position to refer business and those providing items or services for which Medicare or Medicaid pays.

The OIG has made clear that compliance with both the form and the substance of a safe harbor is required in order for it to provide protection. The OIG demands that if one underlying intent is to obtain a benefit for the referral of patients, the safe harbor would be unavailable and the AKS would be violated.

**2003 Special Advisory Bulletin**

The 2003 Special Advisory Bulletin sheds light on company model structures. It focuses on arrangements in which a health care provider in an initial line of business, the “owner,” expands into a related business by contracting with an existing provider of the item or service, the “manager/supplier,” to provide the new item or service to the owner’s existing patient population. Note that the term “existing provider” is not limited to situations in which anesthesiologists have an existing relationship with the ASC at the time the company model joint venture is formed.

The bulletin lists some of the common elements of these problematic structures:

- The owner expands into a related line of business that is dependent on direct or indirect referrals from, or on other business generated by, the owner’s existing business.
- The owner does not operate the new business—the manager/supplier does—and does not commit substantial funds or human resources to it.
- Absent participation in the joint venture, the manager/supplier would be a competitor in the new line of business, providing services, billing and collecting in its own name.
- The owner and the manager/supplier share in the economic benefit of the owner’s new business.
- The aggregate payments to the owner vary based on the owner’s referrals to the new business.

Those elements hint at a company model structure in which an ASC, or some or all of its surgeon-owners, forms an anesthesia company for the purpose of providing anesthesia services to itself. Little

capital is required. The anesthesiologists, not the owners, provide the services. But for their engagement by the company, they would be providing anesthesia services for their own account. The owners of the company capture a share of the anesthesia revenue. And importantly, the more cases the ASC or its surgeons refer to the company, the more money those owners make.

The 2003 bulletin states that despite attempting to fit the contracts creating these joint venture relationships into safe harbors, such protection might not be available, as they would protect only the payments from the owner to the manager/supplier for services rendered. They would not shield the "payment" from the manager/supplier back to the owner in the form of its agreement to provide services to the joint venture for less than the available reimbursement—that is, the "discount" given within the joint venture.

**2012 Advisory Opinion 12-06**

The OIG's June 1, 2012, Advisory Opinion 12-06 was that agency's first pronouncement directly on the propriety of the company model. And importantly, that opinion also addresses the management fee arrangement.

In Advisory Opinion 12-06, the requestor, an anesthesia group, set out two alternative proposed scenarios in regard to its relationship with a group of ASCs owned by surgeons.

**Alternative A—The Management Fee**

The anesthesia group would continue to serve as the ASCs' exclusive anesthesia provider and bill and collect for its own account. However, it would pay the ASCs for "management services," including preoperative nursing assessments, space for all the group's physicians' material and their personal effects, and for assistance with transferring billing documentation to the group's billing office.

Although both Medicare and private payers set their reimbursement to ASCs taking into account the expenses of the type included within the management fee, the ASCs would continue to bill Medicare and private payers in the same amount as currently billed.

The management fee would be at fair market value and determined on a per-patient basis. No management fee would be charged in connection with federal health care program patients.

Consistent with its longstanding viewpoint, the OIG found that carving out federally funded patients was ineffective to remove the proposed arrangement from within the purview of the AKS, because the payment of the fee in connection with private payers would influence the decision to refer all cases, thereby not reducing the risk that their payment is made to induce the referral of the federally funded ones.

The OIG stated that the AKS seeks to ensure that referrals will be based on sound medical judgment, and competition for business based on quality and convenience, instead of paying for referrals. But under the management fee proposal, the ASCs would be paid twice for the same services, by Medicare or by the private payer via the facility fee, and then also by the anesthesiologists via the management fee. That double payment could unduly influence the ASCs to select the requestor as the ASCs' exclusive provider of anesthesia services.

**Alternative B—The Company Model**

The surgeon-owners of the ASCs would set up a series of entities to provide anesthesia services, on an exclusive basis, at each of the ASCs. Those entities would be wholly owned either directly by the surgeon's entities or by the ASCs.

Those anesthesia companies, in turn, would engage the requestor anesthesia group on an exclusive basis as an independent contractor to provide the actual anesthesia care and certain related services, described in the Opinion as including:

- recruiting, credentialing and scheduling anesthesia personnel;
- ordering and maintaining supplies and equipment;
- assisting the anesthesia companies in selecting and working with a reputable anesthesia billing company;

- monitoring and overseeing regulatory compliance;
- providing financial reports;
- implementing quality assurance programs; and
- providing logistics (including, if necessary, assisting the anesthesia companies in structuring independent contractor or employment relationships with anesthesia personnel and assisting in establishing a separate anesthesia corporation).

In turn, the anesthesia companies would pay the requestor a negotiated rate for the services. The fees for the services would be paid out of the anesthesia-related collections, with the anesthesia companies retaining any profits.

In analyzing the company model alternative, the OIG stated that even if one assumed that the surgeon-investors qualified for the ASC safe harbor in respect of their investment in the surgery center, there was no safe harbor available in respect of the distributions that they would receive from their anesthesia company. The ASC safe harbor protects returns on investments only in circumstances where the investment entity itself is a Medicare-certified ASC, which is an entity that operates exclusively for the purpose of providing surgical service, and anesthesia services are not surgical services.

Even if the safe harbor for payment to employees applied or if the safe harbor for personal services contracts applied, and therefore the payments to the anesthesiologists were protected by a safe harbor (note that this means that the payments were at fair market value, which is what many experts think is the magic bullet in terms of all compliance—it is not), neither of those safe harbors would apply to the company model profits that would be distributed to the ASCs' physician-owners, and such remuneration would be prohibited under the AKS if one purpose of the remuneration is to generate or reward referrals for anesthesia services.

After stating that the failure to qualify for a safe harbor does not automatically render an arrangement a violation of the AKS, the OIG then turned to an analysis pursuant to the 2003 Special Advisory Bulletin

(discussed above) and found that the physician-owners of the proposed company model entity would be in almost the exact same position as the suspect joint venture described in the Bulletin: that is, in a position to receive indirectly what they cannot legally receive directly—a share of the anesthesiologists' fees in return for referrals.

Therefore, the OIG stated that the proposed company model venture would pose more than a minimal risk for fraud and abuse.

In sum, the OIG concluded that either of the proposed arrangements, the management fee arrangement or the company model arrangement, could potentially generate prohibited remuneration under the AKS, and the OIG potentially could impose administrative sanctions on the requestor.

**The Bottom Line**

The bottom line is that both company model ventures and management fee arrangements are fraught with kickback danger for all parties involved. Note that there is no requirement that there be a third entity, the so-called anesthesia company, involved for the analysis applied by the OIG to apply: Similar arrangements directly between an ASC and anesthesiologists trigger the same concerns.

Each situation must be analyzed carefully, because there is a high chance of an AKS violation leading to criminal fines, civil penalties, exclusion as a provider and even imprisonment.

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