



OIG Advisory Opinion: No Safe Harbors for Certain Provider Contracts

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The Department of Health and Human Services Office of Inspector General (“OIG”) issued an Advisory Opinion last week in which it stated that two provider proposals with physician-owned ambulatory surgery centers (“ASCs”) could lead to sanctions.

The scenario involves an anesthesia services provider (“Requestor”) that provides anesthesia services on an exclusive basis to several physician-owned ASCs.

The Requestor asked for an opinion regarding two proposals, the first of which would require the Requestor to pay the ASCs a per-patient fee for “management services,” excluding federal healthcare program patients. The fee would pay for services such as administrative, recordkeeping, and housekeeping items and services, which the ASCs currently provide without an additional fee.

The OIG concluded that the additional payment in the form of the management services fees could unduly influence the ASCs to select the Requestor as the exclusive provider of anesthesia services. Excluding Federally insured patients would not reduce the risk that the anesthesia provider's payments would be paid to induce referrals.

Under the second proposal, the ASCs would establish a subsidiary to provide anesthesia-related services, rather than using the Requestor. The ASCs would then engage the Requestor as an independent contractor to exclusively provide certain anesthesia-related services to the subsidiaries.

OIG also took issue with this scenario, noting that the ASC’s physician-owners could generate remuneration in the form of the difference between what the subsidiaries billed and the amounts it would pay to the Requestor for its services. There is no safe harbor for such an arrangement and according to OIG, it poses more than a minimal risk of fraud and abuse.

OIG concluded that the physician-owners were trying to do indirectly what they cannot do directly – that is, “to receive compensation in the form of a portion of the Requestor’s anesthesia services revenues, in return for their referrals to the Requestor.”

The full text of the Advisory Opinion can be read [here](#).