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HEALTHCARE BULLETIN

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OIG ADVISORY OPINION

PHYSICIAN INVESTMENT IN AMBULATORY SURGERY CENTERS

Physicians interested in investing in ambulatory surgery centers ("ASCs"), and ASCs looking to admit new physician-investors should consider the implications of the OIG's October 12, 2007 Advisory Opinion (No. 07-13), which determined that the proposed admission of certain optometrists as owners of three single-specialty ophthalmology ASCs could potentially generate prohibited remuneration in violation of the Anti-Kickback statute.

The advisory opinion was requested by a physician group practice and the limited liability company which owns and operates the ASCs (the "Surgery Center"). The group practice is composed of eight ophthalmologists (the "Ophthalmologists"), nine optometrists (the "Optometrists") and one wholly-owned subsidiary of a nonprofit hospital system (the "Hospital").

The Surgery Center was jointly owned by certain Ophthalmologists (but not the group practice) and the Hospital. The Ophthalmologists owned 54.33% of the membership interests in the Surgery Center, and the Hospital owned the remaining 45.67%.

The proposed arrangement called for the Hospital to sell a portion of its ownership interest in the Surgery Center to the Optometrists over a three-year period. The parties certified that no Optometrist would, directly or indirectly, receive financial assistance from the Surgery Center, the group practice or any other investor in either entity, and the same terms would be offered to each Optometrist without regard to the potential volume or value of referrals. The purchase price for the ownership interests would additionally be determined pursuant to an independent appraisal of fair market value.

According to the background information in the opinion, the Optometrists made referrals to the Ophthalmologists for the treatment of actual or suspected eye diseases or injuries, and, as members of the group practice, agreed to refer patients to the group practice facilities or the ASCs owned by the Surgery Center, except where patients chose otherwise or other facilities existed which were more appropriate for the treatment of a patient's condition.

In analyzing this proposed arrangement for potential violation of the Anti-Kickback statute, the OIG first focused on whether the arrangement satisfied the Anti-Kickback statute safe harbor for hospital/physician owned ASCs. The OIG pointed out that the safe harbor requires, among other things, that ownership be limited to physicians who perform ASC procedures on a regular basis (as demonstrated by meeting the one-third practice income test) and other investors who are not in a position to generate referrals to the ASC or its investors. The OIG concluded that the proposed arrangement failed to meet the safe harbor requirements because the Optometrists did not perform ASC procedures, but they were in a position to generate referrals for the ASC investors.

After the OIG determined that the parties were unable to satisfy the hospital/physician owned ASCs safe harbor, it then considered whether the proposed arrangement would pose a minimal risk under the Anti-Kickback statute. In doing so, the OIG found that there were no safeguards to minimize the risk that the Optometrists' investment in the Surgery Center would be for the purpose of inducing or rewarding referrals.

The OIG also found that the Ophthalmologists and Optometrists were in distinctly different positions. In particular, it determined that the Ophthalmologists personally performed surgical procedures at the ASCs and such surgical business was effectively an extension of their practices. For the Optometrists, however, the ASCs were not a comparable extension of their office practices. As a result, the OIG concluded that the likelihood that the Optometrists would use their investment in the Surgery Center as a vehicle for receiving remuneration for referrals to the Ophthalmologists increased significantly. Therefore, the OIG concluded that the proposed arrangement posed a risk of fraud and abuse of the federal programs.

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Should you have any questions regarding this Advisory Opinion or its impact on an existing or pending arrangement, please do not hesitate to contact one of our healthcare attorneys at the offices below.

HEALTHCARE CONTACTS

BIRMINGHAM, AL

Matthew A. Aiken
205.226.3425
maiken@balch.com

Colin H. Luke
205.226.8729
cluke@balch.com

Jack B. Levy
205.226.8750
jlevy@balch.com

MONTGOMERY, AL

Dorman Walker
334.269.3138
dwalker@balch.com

ATLANTA, GA

Richard D. Sanders
404.261.6020
rsanders@balch.com

GULFPORT, MS

H. Rodger Wilder
228.214.0412
rwilder@balch.com

JACKSON, MS

Armin J. Moeller Jr.
601.965.8156
amoeller@balch.com