

Healthcare Law Alert: OIG Issues Favorable Advisory Opinion on ASC Investment by a Health System, Physicians, and a Management Company

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On April 26, 2021, the U.S. Department of Health & Human Services, Office of the Inspector General (OIG) issued an advisory opinion ([AO 21-02](#)) regarding an investment by a Health System, five orthopedic surgeons, and three neurosurgeons employed by the Health System (Physician Investors), and a management company (Manager) in a new ambulatory surgery center (New ASC). Under the proposed arrangement (Arrangement), the Health System would own 46%, the Physician Investors collectively would own 46% (with individual interests ranging from 4% to 8%), and the Manager would own the remaining 8% of the New ASC. The requestors sought the advisory opinion to determine if the Arrangement would violate the federal anti-kickback statute (AKS).

Concerning the Physician Investors' interest, OIG stated that the Arrangement would fail to meet the "Physician ASC Safe Harbor" requirement because some of the neurosurgeon Physician Investors did not derive at least one-third of their medical practice income from the performance of procedures that will be reimbursed by Medicare if performed in an ASC (Qualified Procedures) for the previous fiscal year or 12-month period (the 1/3 Test), as required to meet the Safe Harbor. Further, the AKS could be implicated because the Health System, the Physician Investors, and the Manager could make or influence referrals to the ASC for items and services reimbursable by federal health care programs.

Despite these concerns, OIG opined that it would not impose sanctions under the AKS relating to the Arrangement due to various safeguards against fraud and abuse, including:

- Although the Manager may be in a position to directly or indirectly influence referrals to the New ASC of items and services reimbursable by federal health care programs, it certified that it would not make or influence referrals to the Physician Investors or New ASC, and no physician has or would have ownership in the Manager
- Although one or more of the neurosurgeon Physician Investors would fail to meet the 1/3 Test, they would use the New ASC regularly as part of their medical practice (e.g., to personally perform neuroplasty procedures)
- The Physician Investors would rarely refer patients to each other for ASC-qualified procedures; rather, each Physician Investor would personally perform almost all ASC-qualified procedures he or she refers to the New ASC
- The Arrangement would contain certain safeguards to reduce the risk that the Health System would make or influence referrals to the New ASC or the Physician Investors, including refraining from taking any action to require or encourage affiliated physicians (employees, independent contractors, and medical staff members of the Health System) to refer patients to the New ASC and refraining from tracking referrals made by affiliated physicians to the New ASC
- The Arrangement would be structured in a manner that would not reward investors who are referral sources for their referrals (e.g., offers of ownership and distributions would not be tied to referrals)
- The New ASC, the Health System, and the Physician Investors would treat patients receiving medical benefits or assistance under federal health care programs in a non-discriminatory manner.

This advisory opinion may signal greater flexibility for ASC investments by hospitals, physicians, and management companies, so long as the investors implement safeguards against fraud and abuse.

If you have any questions about this alert or any other Healthcare Law issue, please contact:

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