

Re: **OIG Advisory Opinion 03-8**

Dear Healthcare Provider:

The Department of Health and Human Services' Office of Inspector General ("OIG") recently published Advisory Opinion No. 03-8, which concerns an agreement to provide management services to hospitals and could impact several existing arrangements between individual physicians (and/or physician groups) and hospitals. As you may be aware, Advisory Opinions are only binding upon the requestor and are limited to the presented facts and circumstances; however, because the commentary in the Advisory Opinions sheds light on the OIG's enforcement priorities and the manner in which the OIG applies the law to a given set of facts, the health care community frequently turns to the Advisory Opinions for guidance. We are providing the following brief summary of Advisory Opinion No. 03-8 to assist in you in evaluating its relevance to your current practices.

Background

The Requestor wished to develop and manage inpatient rehabilitation units (the "Unit(s)") in general acute care hospitals in exchange for a monthly management fee that reflects fair market value and is calculated on pre-established fixed amount per patient per day. The Requestor would provide several additional services, including: all patient care personnel, except for nurses, who would be provided by the hospital; a program director, community outreach coordinator and medical director; and marketing activities, including in-service workshops for hospital personnel and distribution of literature

The hospital would pay to the Requestor a Management Fee that reflects fair market value. The hospital would bill and collect for all services rendered by the Unit, other than professional services, which would be billed by the physicians. The medical director would be a hospital staff physician from an appropriate specialty and would be engaged by Requestor pursuant to an independent contractor agreement. The medical director might also have a separate private medical practice and might refer his or her patients to the Unit. The medical director, program director and community outreach coordinator would engage in marketing activities with individuals in a position to influence referrals to the Unit.

Problems Cited by OIG

The Requestor avowed that the arrangement would fit within the personal services and management contracts safe harbor under the federal Anti-Kickback Statute because it met the multiple requirements under that safe harbor, including, among other things, a written contract with a duration of at least one (1) year and compensation that was set in advance. The Requestor had hoped that a "per patient" fee would avert the scrutiny to which percentage fees are vulnerable in management services arrangements with hospitals. However, the OTG disagreed that per patient fees met the "compensation set in advance" requirement of the safe harbor. The OIG indicated that "per patient" and "per click" payment arrangements are disfavored under the

Anti-Kickback Statute because although the fee may be fixed and set in advance, the compensation is still dependent upon the volume or value of referrals generated between the parties.

Once the OIG determined that the arrangement posed by Requestor did not qualify for the safe harbor, its task was to assess whether there was sufficient risk of fraud and abuse to deny the prospective protection sought by the Requestor. The OIG observed that nurses working in the Unit (but employed by the hospital) would be performing pre-admission screenings on prospective patients of the Unit and would share with Requestor the goal of making the Unit a financial success. The OIG was also troubled by the Requestor's intention to directly provide marketing services that would engage persons in a position to make referrals to the Unit. The OIG viewed these features of the arrangement as contributing to the risk of overutilization, and ultimately concluded that the risk of fraud and abuse was too high for the OIG to afford the arrangement prospective protection.

Conclusion

The notion of "compensation set in advance" has long been a source of ambiguity for providers trying to qualify for safe harbor protection under the Anti-Kickback Statute. Some would argue that the compensation in Advisory Opinion No. 03-8 was set in advance because the per patient fee was pre-established and fixed; however, **it** seems clear from the OIG's comments that where a "set in advance" fee has the potential to fluctuate according to the volume of referrals, **it** will not likely be deemed "compensation set in advance" as contemplated by the safe harbor requirement.

Advisory Opinion No. 03-8 provides another tool for discerning the OIG's position with respect to various business arrangements. As such, we encourage you to continually evaluate your practices in light of the available information and take precautions to ensure compliance with all applicable laws. If you have any questions about Advisory Opinion No. 03-8 or would like assistance **in** evaluating, restructuring or renegotiating your business arrangements, please feel free to contact our office.