Physician Recruitment Arrangements: The OIG Looks Beyond Hospitals in Health Professional Shortage Areas

By Kenneth Yood and Brad Stein

In a May 3, 2001 Advisory Opinion, the Office of Inspector General ("OIG") reviewed a physician recruitment arrangement which, like most physician recruitment arrangements, does not fit within the Antikickback Statute's safe harbor for practitioner recruitment.

Since the practitioner recruitment safe harbor specifically requires that recruiting hospitals be located in a designated health professional shortage area (HPSA), many hospitals located in urban and non-designated rural communities have been faced with a lack of Antikickback Statute guidance for what is a very common hospital/physician arrangement. As described below, the Advisory Opinion fills in some of the gaps for the majority of hospitals who have entered into and are considering assisting physicians who are willing to relocate or start their practices in the hospital's service area.

The Recruitment Arrangement Under Review

In the Advisory Opinion, the OIG reviewed a proposed physician recruitment arrangement between a hospital located in a designated medically underserved area (the "Hospital") and a physician entering into a five year residency program for otolaryngologist/head and neck surgery (the "Physician"). Prior to proposing the recruitment package, the Hospital performed an analysis regarding the need for otolaryngologist/head and neck surgeons in its service area. Under the proposed arrangement, the Physician received a loan from the Hospital to cover the Physician's outstanding medical school debts. Upon completion of the residency program, the Physician agreed to establish a full time otolaryngologist/head and neck surgery practice in the Hospital's service area and perform additional obligations for three years. The loan would be repaid, with interest, over three years, but the Hospital would forgive a third of the loan for each year the Physician fulfilled his obligations. If the Physician defaulted on any obligations, the remaining loan balance would become due.

The Antikickback Statute

The Antikickback Statute is an intent-based statute which prohibits remuneration in exchange for referrals reimbursed by federal health care programs. The OIG has promulgated certain safe harbor regulations that define arrangements which would not be subject to the Antikickback Statute if they comply with the safe harbor conditions.

The OIG promulgated a safe harbor for recruitment arrangements to attract physicians to health professional shortage areas that includes nine conditions. The safe harbor does not protect recruitment arrangements in areas that are not HPSAs.

The OIG's Analysis

Physician recruitment arrangements that implicate the Antikickback Statute but do not qualify for the practitioner recruitment safe harbor must be evaluated on a case-by-case basis. As stated in the Advisory Opinion, in making such an evaluation, the OIG will consider a number of factors, including but not limited to the following:

I. Whether there is documented evidence of an objective need for the physician's services.
II. Whether the physician has an existing stream of referrals within the Hospital's service area.
III. Whether the benefit is narrowly tailored so that it does not exceed that which is reasonably necessary to recruit.
IV. Whether the remuneration benefits other referral sources or is related to broader arrangements.

The OIG's Conclusion

The OIG determined the Hospital would not be subject to administrative sanctions for violations of the Antikickback Statute in connection with the proposed recruitment arrangement. While the arrangement does not fit within the Antikickback recruitment safe harbor because the physician is not relocating to a HPSA and the benefit is greater than three years, the OIG found that the arrangement poses a minimal risk of violating the Antikickback Statute.

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The OIG based its conclusions on the following: (1) the Hospital had certified that the service area possessed a documented shortage of the specialty; (2) upon establishing his practice, the physician would not have a ready stream of referrals since he would be a newly minted physician who had not previously practiced in the service area; (3) the benefits provided under that arrangement were narrowly tailored - the arrangement otherwise complied with the other safe harbors and/or contained certain safeguards such as: (a) the repayment period was limited to three years, (b) the arrangement would not be renegotiated during its term, (c) the physician was free to establish staff privileges elsewhere, and (d) the value of remuneration would not be adjusted based upon referrals; and (4) because the counties in the service area are medically underserved, the public would benefit by having the specialty.

**Take-home Message From the OIG Advisory Opinion**

For hospitals that cannot meet the Antikickback safe harbor for practitioner recruitment arrangements because they are not HPQA hospitals, this OIG Advisory Opinion instructs that such hospitals may enter into recruitment arrangements without violating the Antikickback Statute if they follow certain guidelines.

- **Need.** The hospital must document the community need for the type of services for which it is recruiting. Even if the hospital's service area is not a designated medically underserved area, the hospital should be able to evidence that the medical specialty at issue is needed in the service area.

- **Minimum Benefits.** The benefits offered to recruit the physician must be specifically and narrowly tailored so that they are the minimum benefits required to recruit the physician.

- **Referral Source.** Group physician recruitment arrangements - i.e., arrangements with an existing in-area medical group to recruit a physician to join the group's practice are subject to more stringent scrutiny than arrangements which recruit an individual physician to start a solo medical practice. Since the medical group is in a position to refer patients to the recruiting hospital, it is especially incumbent upon hospitals who enter into such an arrangement to ensure that the benefits provided to any such medical group are specifically tailored to the recruitment of a designated physician and such benefits are limited to the community benefit associated with the physician's presence within the service area.

The OIG, in scrutinizing such recruitment arrangements that do not meet the safe harbor, will examine whether the arrangement otherwise meets the safe harbor conditions and will inspect related or broader arrangements between the parties. Thus, physician recruitment arrangements have a better chance of surviving OIG scrutiny if the arrangement meets many of the safe harbor conditions and if the parties do not have related arrangements that would cause the OIG concern.

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*Note: OIG = Office of Inspector General.*

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