

According to the Deputy Administrator and Director with the Centers for Medicare & Medicaid Services' (CMS) Center for Program Integrity, waste accounts for 30% of overall healthcare costs. It is increasingly clear that the US Department of Health and Human Services (HHS) intends to significantly reduce that percentage by now focusing on individual physicians rather than only going after the organizations that pay them.

Latest OIG Fraud Alert – Warning to All Physicians

On June 9, 2015, the Office of Inspector General (OIG) released a fraud alert warning physicians that they could face liability under the Anti-Kickback Statute unless their compensation arrangements, such as medical director agreements, reflect fair market value for bona fide services the physicians actually provide. As part of the fraud alert, the OIG encouraged physicians "to carefully consider the terms and conditions of medical directorships and other compensation arrangements before entering into them." Medical directorships will continue to be a focus because medical directors put individual physicians in a key position to generate business for the entity.

To underscore the seriousness of the issue, the OIG highlighted the fact that it has recently reached settlements with 12 individual physicians regarding questionable medical directorship and office staff arrangements. Compliance issues under these agreements included compensation that reflected the volume or value of referrals, compensation that was not fair market value for services performed and payment for services that were not actually performed. In one case, the OIG noted that the arrangement called for the affiliated healthcare entity to pay the salaries of the physicians' front office staff, providing physicians an improper benefit by relieving them of that burden. This fraud alert, coupled with similar alerts released in 2013 and 2014, puts physicians on notice that they too can be the focus of enforcement activity. This appears to represent a shift by the OIG, which previously concentrated its enforcement efforts on larger entities, like hospitals and healthcare systems, rather than individual physicians.

OIG Hires Additional Attorneys to Enforce Actions Against Individual Physicians, but Entities Are Not Off the Hook

Only two days after releasing its latest fraud alert, a deputy director from the OIG announced that it will be hiring additional attorneys to look into taking more administrative actions against physicians in their individual capacity. This announcement emphasizes that the OIG means serious business – not only is the OIG shifting its focus to the physicians themselves, but it is hiring a team of attorneys as further enforcement. In a related development, the Department of Justice recently reached a record settlement for paying physicians improperly as medical directors. This confirms that while the OIG is broadening its enforcement to individual physicians, the entities are not off the hook.

Tips for Physicians

1. Ensure medical director agreements – in fact, any financial arrangement, such as office staff arrangements – contain fair market value compensation for services that will actually be provided.
2. Make sure services provided under the financial agreement do not overlap with obligations under other agreements – this could be seen as double compensation.
3. Begin building evidentiary support (e.g., documenting time spent performing tasks under the agreement) in case the agreement is challenged. Documentation will be important in order to show that compensation was in fact based on the services provided rather than for a physician's past or future referrals.
4. Agreements that seem "too good to be true" should be viewed with suspicion.

Contacts

Mimi H. Brouillette

+1 303 894 6157
mimi.brouillette@squirepb.com

Sven C. Collins

+1 303 894 6370
sven.collins@squirepb.com

Adam D. Colvin

+1 513 361 1216
adam.colvin@squirepb.com

Patrick D. Cornelius

+1 614 365 2781
pat.cornelius@squirepb.com

Patrick J. Dugan

+1 614 365 2773
patrick.dugan@squirepb.com

Mel M. Gates

+1 303 894 6111
melodi.gates@squirepb.com

Bryna S. Hummel

+1 646 557 5182
bryna.hummel@squirepb.com

Jim Jacks

+1 214 758 3519
james.jacks@squirepb.com

Kelly A. Leahy

+1 614 365 2839
kelly.leahy@squirepb.com

Elizabeth A. Mills

+1 513 361 1203
elizabeth.mills@squirepb.com

Stanford L. Moore

+1 614 365 2793
stanford.moore@squirepb.com

Stephen P. Nash

+1 303 894 6173
stephen.nash@squirepb.com

Robert D. Nauman

+1 614 365 2721
robert.nauman@squirepb.com

Peter A. Pavarini

+1 614 365 2712
peter.pavarini@squirepb.com

Gary P. Timin

+1 305 577 2860
gary.timin@squirepb.com

Michi M. Tsuda

+1 303 894 6158
michi.tsuda@squirepb.com

Nicole J. Webb

+1 513 361 1207
nicole.webb@squirepb.com

Cass Weiland

+1 214 758 1504
cass.weiland@squirepb.com

John E. Wyand

+1 202 626 6676
john.wyand@squirepb.com

Thomas E. Zeno

+1 202 626 6213
thomas.zeno@squirepb.com

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

© Squire Patton Boggs.