

OIG Weighs In On Block Leasing Arrangements

Aug 27 2008

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With the seeming demise of per-click leasing arrangements between referral sources, attention has shifted to alternative lease structures that achieve legal compliance while also aligning financial incentives between the parties. While the Centers for Medicare and Medicaid Services ("CMS") recently acknowledged the potential availability of "block" leases as such an alternative, the Office of Inspector General ("OIG") has just released an advisory opinion that places clear limitations on such arrangements. Specifically, the OIG concluded that a block lease arrangement (the "Proposed Arrangement") between referral sources could violate the anti-kickback statute in circumstances where the lessee retains the difference between (a) the rental charge under the lease and (b) the reimbursement that the lessee receives for the services provided by the lessee through the use of the leased space and equipment, even assuming that the rental charges were consistent with fair market value. The OIG perceived that the Proposed Arrangement was an improper vehicle for sharing of the profit on the use of the space and equipment.

Background of Proposed Arrangement

The Proposed Arrangement involved a block lease arrangement between a physician group practice (the "Group Practice") that provides cancer treatment services and a group of urologists (the "Urologist Group"). Under the Proposed Arrangement, the Urologist Group would lease from the Group Practice all of the equipment, space and services necessary to provide a certain prostate cancer treatment known as intensity-modulated radiation therapy (the "Treatment"). The Urologist Group would pay the Group Practice space rent, equipment rent, personnel expenses, and communication and administrative expenses. While the compensation under the block leases would be fair market value and set in advance, and would not vary with the use of the premises, equipment or services, the compensation would be less than the reimbursement received from payors for the Treatment.

Currently, the Group Practice bills the technical and professional components of the Treatment, using the Group Practice billing number. Under the Proposed Arrangement, the professional and technical components would be billed using the billing number assigned to the Urologist Group. The Urologist Group would retain the difference between the fees collected and the amounts owed under the block leases with the Group Practice.

OIG Analysis

The OIG reasoned that the block lease arrangement, in effect, established a joint venture between the Group Practice and the Urologist Group. Reiterating its concerns regarding similar joint ventures outlined in prior guidance (*See e.g.*, the OIG's 1989 Special Fraud Alert on Joint Venture Arrangements, reprinted in the Federal Register in 1994 (59 FR 65362, 65363 (Dec. 19, 1994)) and Special Advisory Bulletin on Contractual Joint Ventures (68 FR 23148 (April 30, 2003)), the OIG outlined the following problematic aspects of the Proposed Arrangement:

- The Urologist Group would be expanding into a related line of business, prostate cancer treatment, which is dependent on referrals from the Urologist Group;
- The Urologist Group would contract out substantially all aspects of the Treatment, including the professional services;
- On the whole, the Urologist Group would commit little in the way of financial, capital, or human resources and, accordingly, would assume very little real financial and business risk;
- The Urologist Group would be in a position to ensure the success of the business, not only by referring to the Group Practice's facility, but by the choice of the Treatment over other available therapies for prostate cancer;
- The Group Practice is an established provider of the same services that the Urologist Group would provide via the Proposed Arrangement and is in a position to directly provide the Treatment in its own right, billing in its own name, and retaining all available reimbursement;
- The Urologist Group would use the premises, equipment and staff of the Group Practice to serve its own patient base – the may have been referred to the Group Practice or other outside suppliers for the Treatment;
- The aggregate income to the Urologist Group under the Proposed Arrangement would vary with referrals from the Urologist Group to the Group Practice, and, because the various agreements could be tailored to fit the historical pattern of referrals by the Urologist Group, so might the income to the Group Practice; and
- The Group Practice and the Urologist Group would share in the economic benefit of the Treatment.

Based on these elements, the OIG concluded that the Proposed Arrangement could violate the anti-kickback statute if it is designed to permit the Group Practice to "pay" the Urologist Group a share of the profits from their referrals, where the "payment" or profit constitutes the difference between the reimbursement received by the Urologist Group and the rent and fees paid by the Urologist Group under the block lease. Consistent with past guidance, the OIG focused on the profit to the Urologist Group as the problematic "payment" rather than the payments to the Group Practice, which could be structured to satisfy one or more safe harbors.

With the recent prohibitions on per-click and percentage-based lease arrangements under the Stark regulations, block lease arrangements may, at first blush, appear to be an effective model for aligning financial incentives between referral sources. However, as illustrated by this Advisory Opinion, block lease arrangements often involve subtle and complex financial relationships that must be carefully considered prior to entering into such an arrangement. That said, this Advisory Opinion does not outlaw all block lease arrangements; rather, it merely reinforces the OIG's longstanding position that block leases, like all financial relationships between referral sources, must be closely scrutinized to ensure that they do not involve potentially prohibited remuneration.

When considering block lease arrangements, parties should be particularly concerned with (1) arrangements that involve outsourcing services that could otherwise be provided directly by the outsourcing/lessor entity, (2) arrangements that involve the shifting or sharing of profits derived from services referred by one party, and (3) arrangements that involve little, if any, financial or business risk for one party, especially when all or most of the business will be derived from referrals from that party.

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