FAVORABLE

OIG WATCH

09-09

Hospital-physician ASC joint venture with tangible asset-only valuation

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What OIG Said

OIG said this can be okay if valuations are based solely on tangible asset fair market value and explicitly exclude referral volume or business generated.

- ✓ A hospital and seven orthopedic surgeons planned to merge two separate single-OR ASCs into one jointly-owned two-OR facility. Each party would contribute their existing ASC, with cash equalization payments based on independent appraisals of the tangible assets (equipment, furnishings, supplies).

- ✓ OIG acknowledged this is remuneration under Anti-Kickback because physician investors are referral sources. But they blessed it because the appraisals would not include the volume or value of referrals, past or anticipated business, or any intangible assets, only the fair market value of physical assets.

- ✓ OIG specifically warned against cash flow-based valuations or other methods that include intangible assets. Because the surgeons are referral sources to their ASC, a going-concern cash flow analysis could capture the value of their referrals over time, creating returns disproportionate to actual capital invested.

- ✓ The arrangement also included safeguards: hospital employees won't refer to the ASC, the hospital won't track or encourage medical staff referrals, medical staff compensation stays at FMV and doesn't account for ASC referrals, and the hospital continues operating its own outpatient surgery facilities.

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Diligence Checklist

What you need to be ready to show in diligence

- ✓ Have independent third-party appraisals that value only tangible assets, equipment, furniture, fixtures, supplies, with explicit documentation that the valuation excludes referral volume, business generated, patient flow, or any other intangible value tied to physician referrals.
- ✓ Prove that capital contributions and ownership percentages are proportional, and that returns on investment don't create disproportionate distributions that could reward referral volume. Show that any equalization payments are based solely on tangible asset FMV differences.
- ✓ Avoid cash flow-based valuations or going-concern analyses for physician-contributed assets when those physicians are referral sources. These methods risk capturing referral value and creating the appearance that returns reward steering rather than capital invested.
- ✓ Document safeguards that prevent the hospital from tracking, requiring, or incentivizing referrals to the joint venture, and show that any hospital compensation to medical staff is at fair market value and independent of ASC referrals.
- ✓ Keep evidence that ownership structures (including any pass-through entities like LLCs) maintain proportional distributions and don't redirect returns to reward referrals or circumvent proportionality requirements.

If your ASC valuation includes intangible assets, referral history, or business projections tied to physician investors who are referral sources, this is the profile OIG said could reward referrals through disproportionate returns.

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Structure not diligence-ready?

Cabra Consulting helps healthcare organizations make sure compensation and transaction structures are independently valued, clearly scoped, and defensible in diligence.

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