UNFAVORABLE

OIG WATCH

11-17

Lab management services paid as percentage of physician's gross collections

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What OIG Said

OIG said percentage-based compensation is inherently problematic because it tracks volume and value of business generated, not the fair market value of services actually provided.

- A lab management company proposed providing turn-key allergy testing services within physicians' offices (all personnel, equipment, supplies, training, billing) in exchange for 60% of the physicians' gross collections from allergy testing and immunotherapy services.

- Even though the requestor claimed the percentage fee equals fair market value, OIG said percentage compensation arrangements are inherently problematic under anti-kickback because they relate to the volume and value of business generated between parties rather than the fair market value of services provided.

- The fee structure failed safe harbor requirements on two critical grounds: fees weren't set in advance (they varied with collections), and they were determined based on the volume and value of Federal health care program business.

- OIG noted the percentage structure combined with Requestor identifying patients for testing created overutilization risk, and emphasized that even attempting to comply with Stark Law's in-office ancillary exception doesn't affect anti-kickback analysis; the statutes are independent.

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Diligence Checklist

What you need to be ready to show in diligence

- ✓ Have management fees, service fees, or compensation set in advance for a defined term (typically 12+ months) as a fixed dollar amount or fixed rate per unit of service, not as a percentage of collections, gross revenue, or net income that varies with business volume.
- ✓ Show that the method used to determine compensation is reliable and defensible: third-party fair market value opinions must demonstrate fees are based on actual services provided, time commitments, and commercial necessity, not on expected volume or value of Federal program business.
- ✓ Prove fees are tied to the scope and value of services actually rendered, not to the profitability or revenue generation of the party receiving services, your compensation should stand independent of how much Federal business flows through.
- ✓ Document that services don't include suspect marketing activities like identifying patients for referrals or reviewing patient files to generate business, especially when combined with percentage-based compensation that creates overutilization incentives.
- ✓ Avoid bundled arrangements where you provide substantially all operations (personnel, equipment, supplies, billing) while the "owner" just refers business and pays you a percentage, this mirrors the suspect contractual joint venture profile.

If your fees are calculated as a percentage of collections or revenues, even if you have a valuation report claiming it's "fair market value", this is exactly the fee structure OIG called inherently problematic because it ties compensation to business volume rather than services rendered.

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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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