UNFAVORABLE

OIG WATCH

13-15

Psychiatry group capturing anesthesia revenue for ECT via below-FMV per diem

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What OIG Said

OIG viewed the psychiatry group's ability to keep the spread on anesthesia collections, funded by its own referrals, as remuneration, not fair market value compensation for services.

- OIG reviewed a proposed contract where an anesthesia group would staff ECT cases, reassign its billing rights to a psychiatry group, and be paid a fixed per diem that was below what it could earn billing directly and below fair market value. The psychiatry group would bill, collect, and keep the difference between collections and the per diem.

- OIG characterized that "opportunity to generate a fee" on the anesthesia group's services as remuneration under the Anti-Kickback Statute, even though it flowed through billing rights and a per diem rather than a simple cash rebate.

- The arrangement did not qualify for the personal services safe harbor: compensation was not set in advance, not consistent with fair market value, and the structure rewarded the psychiatry group for the volume of anesthesia referrals it controlled.

- OIG concluded the structure was designed to let the psychiatry group do indirectly what it could not do directly, capture a portion of anesthesia revenues in return for referrals, with no safeguards to minimize kickback risk, and stated it could impose administrative sanctions.

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Diligence Checklist

What you need to be ready to show in diligence

- ✓ Have a reputable third-party FMV opinion covering any per diem, subsidy, or revenue-share tied to professional services, and be prepared to show that rates are not intentionally below FMV to create a spread for a referral source.
- ✓ Show that any "carve-outs" from exclusivity (e.g., specific physicians or programs) do not create side-door opportunities for those providers to capture downstream revenue in exchange for steering cases.
- ✓ Prove that compensation is set in advance, consistent with fair market value in an arm's-length transaction and not determined in a way that takes into account the volume or value of referrals or business generated.
- ✓ Document that billing rights, reassignment arrangements, and collections flows are structured to pay for actual clinical work and necessary services, not to grant "the opportunity to generate a fee" to those who control referrals.
- ✓ Maintain clear agreements among the hospital, exclusive groups, and carved-out providers so there are no off-the-books understandings about who gets which slice of revenue.

If your model depends on a referral source keeping the spread between collections and a below-FMV payment, you are in the profile OIG has already flagged as high risk.

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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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