FAVORABLE

OIG WATCH

22-07

Physician ownership in entities they refer to: when equity structures create remuneration requiring defensibility

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What OIG Said

OIG acknowledged physician ownership in entities they order from creates remuneration, but blessed this structure because ownership stemmed from legitimate IP contribution and distributions were structured to eliminate referral incentives.

- ✓ Orthopedic surgeons (including an inventor and his family members) owned equity in a medical device company that manufactures products they order and use in surgeries at hospitals and ASCs.

- ✓ OIG said this is inherently suspect because physician-owned entities that sell products their owners order raise corruption of medical judgment, overutilization, increased costs, and unfair competition concerns.

- ✓ OIG accepted it because: (a) ownership originated from the inventor-physician contributing substantial proprietary technology (not from referral potential), (b) distributions are proportional to investment and include a "Carve-Out Amount" that reduces distributions by revenue the physician-owners generate, and (c) physician-owners generate less than 1% of company revenue.

- ✓ OIG emphasized the structure avoided red flags like requiring divestiture if physicians stop ordering, tracking physician-owner orders differently to encourage more referrals, or conditioning physicians' hospital privileges on facility purchases of the company's products.

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Diligence Checklist

What you need to be ready to show in diligence

- ✓ Prove physician ownership interests were granted for legitimate business contributions (capital, IP, expertise, practice infrastructure) - not based on past or expected referral volume or revenue generation potential.
- ✓ Show profit distributions are strictly proportional to ownership percentage and don't vary based on individual physician-owners' referral patterns, ordering volume, or revenue generated - consider implementing a carve-out that reduces distributions by physician-generated revenue.
- ✓ Have documentation showing you don't require physician-owners to divest if they stop referring, don't track their referrals differently to encourage more business, and don't use sales reports or dashboards to incentivize physician-owner orders.
- ✓ Maintain written policies prohibiting physician-owners from conditioning their referrals or hospital privileges on facility purchases from the physician-owned entity (no exclusive deals, no "I'll take my cases elsewhere" threats).
- ✓ Keep audit trails showing physician-owners select products/services based on clinical needs, that alternative products are available and disclosed to patients, and that physician-owners generate a relatively small percentage of total entity revenue.

If your ASC, surgery center JV, ancillary service entity, or MSO has physician-investors who also refer patients or generate business for the entity - and you can't prove ownership is tied to legitimate business value (not referral potential) - you're carrying the profile OIG said is inherently suspect.

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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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