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Compliance

New CMS opinion hints that buying 'subsidiary' practices OK under Stark exception

A recent advisory opinion (AO) from CMS explicitly answers a question about whether acquiring subsidiary practices is acceptable under the Stark Law, and some experts suggest it will encourage more practices to do so. That may further fire up an already hot practice acquisition market.

CMS Advisory Opinion No. CMS-AO-2021-01, issued in June, states that a particular group practice's arrangement to purchase subsidiary practices and derive revenue from the practices would be acceptable under the in-office ancillary exception to Stark (*see resources, below*).

The in-office ancillary exception allows practices, within guidelines, to own other entities that provide services, such as laboratories and imaging. In its opinion, CMS notes that in its previous Stark-related rules, the agency "cited the example of a wholly-owned laboratory facility that provides laboratory services to a group practice." But CMS says that this kind of arrangement has always applied to practices as well, though the agency did not "provide an exhaustive list of the types of services a wholly-owned subsidiary may provide to a group practice" in the past.

What's behind the rare event

Advisory opinions issued by the HHS Office of the Inspector General (OIG) are fairly frequent; they've issued 10 already this year. But CMS AOs are rare; apart from specialty hospital AOs, CMS has issued only 17 since 1998. In the 2020 physician fee schedule final rule released in late 2019, CMS made some revisions to its advisory opinion process designed

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to make submission of requests easier and, presumably, to increase the number of CMS AOs, but it's too early to tell whether this has played out in practice yet (*PBN 12/9/19*).

Like OIG, CMS explicitly says its AOs are only applicable to the case under consideration and can't be used as evidence to support the legality of a separate practice engaging in similar activity. But, also like OIG's opinions, they are still taken as signals of legitimacy by providers and the attorneys who advise them.

The June AO reveals that the requestor in this case "currently satisfies all the requirements of 42 C.F.R. § 411.352 to qualify as a group practice for purposes of the physician self referral law" and would be the sole owner of two subsidiary practices, including "all material assets and business functions"; and would become the employers or contractors of their clinical staff. The subsidiaries' current manager would "continue to provide management and other non-clinical services to requestor and the subsidiaries."

The subsidiaries will retain their current tax IDs and Medicare billing arrangements, though that's not a requirement of the arrangement, says Neal T. Goldstein, a partner in the business practice group and head of the health care practice at Patzik, Frank & Samotny Ltd. in Chicago. "What CMS is saying is, 'Don't worry about the subsidiary practice satisfying all of the group practice elements — as long as the parent group satisfies them, you're good,'" Goldstein says.

Teasing out the meaning

Some experts don't think this is much of a breakthrough, though they also think it will excite some people with an interest in health care mergers and acquisitions.

The opinion is "highly technical" and "esoteric," according to Goldstein. "I don't believe it's going to have much of an impact," he says. "It's not something a lawyer would lose sleep over because it's not an abusive type of arrangement … and because it's a logical expansion of the language in the Stark regulations."

Amel Hammad, managing director of Conway MacKenzie, part of Riveron Consulting in Chicago, admits that "it was not widely understood that this arrangement was legal" before the AO, though she thinks that's less CMS' fault and more a matter of provider ignorance. She notes that health systems are "structured very similarly [to this arrangement], with entities with different tax ID numbers that all work together."

But Christina M. Kuta, an attorney with Roetzel & Andress in Chicago, says she's had a few clients ask about it.

Glenn P. Prives, partner with Greenbaum Rowe Smith & Davis in Roseland, N.J., perceives that "after the 1995 final rule and the lab example, folks didn't necessarily think that meant that a physician practice could have a wholly-owned [subsidiary]." Prives says the new AO changes that.

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