OIG Provides New Guidance for ASCs that are Unable to Satisfy the One-Third Income Test Under the ASC Safe Harbor



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In March 2023, the U.S. Department of Health and Human Services Office of Inspector General (OIG) published a frequently asked questions page (the FAQ) that, among other things, provides new guidance on how the OIG will evaluate a physician's ownership of an Ambulatory Surgery Center (ASC) where the physician-owner is unable to satisfy the one-third income test under the ASC safe harbor to the Federal Anti-Kickback Statute (AKS).

Generally, if a physician-owner receives a return on his/her investment in an ASC, such remuneration implicates the AKS. In many cases, the physician is able to satisfy all of the requirements of the ASC safe harbor so that such remuneration does not result in a violation of the AKS. However, in some cases, a physician-owner may be unable to satisfy the requirement that at least one-third of his/her medical practice income from all sources for the previous fiscal year or previous 12-month period be derived from performing ASC procedures (the Practice Income Test). Significantly, failure to satisfy all of the requirements of the ASC safe harbor does not automatically result in a violation of the AKS. Rather, in that event, the arrangement is subject to greater scrutiny by the OIG. In the FAQ, the OIG indicated that, where the Practice Income Test is the only requirement that is not satisfied under the ASC safe harbor, the OIG would evaluate the ASC arrangement based on a "totality of the facts and circumstances of the specific arrangement."

This includes the following:
(i) whether the physician-owner will refer patients to the ASC for procedures that he/she will not personally perform;
(ii) whether the physician-owner will make use of the ASC for his/her own procedures; and
(iii) what circumstances cause the physician-owner to fail the Practice Income Test (e.g., he/she performs a high volume of inpatient procedures).

The OIG's new guidance will assist physicians and ASCs in determining whether an arrangement that does not satisfy the Practice Income Test requirement under the ASC safe harbor poses risk under the AKS.

Click Here to read the entire June 2023 Healthcare Law Update now!

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