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**THE OIG APPROVES A HOSPITAL’S PLAN TO
PROVIDE FREE ELECTRONIC INTERFACE SERVICES TO PHYSICIANS**

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The U.S. Department of Health and Human Services, Office of Inspector General (OIG) recently approved a proposed arrangement for a hospital to provide free electronic interface services to physicians. The hospital requested an advisory opinion from the OIG regarding this proposed arrangement and asked if it would violate the anti-kickback statute.

Under the proposed arrangement, the hospital would provide free access to an electronic interface to any community physicians who request it. The interface is a software technology that allows two separate systems to communicate with each other. The physician could use this interface to transmit orders to the hospital for laboratory and diagnostic services to be performed by the hospital and to receive the results of those services. The physicians would remain responsible for their own electronic health records system, but the hospital would provide support services necessary to maintain the interface, including software updates. The interface would serve no purpose other than the electronic transmission of the orders and results between the physicians and the hospital.

The anti-kickback statute makes it a criminal offense to offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a federal health care program. The OIG’s position is that the provision of free, or below-market goods or services to actual or potential referral sources are “suspect arrangements” under the anti-kickback statute. The OIG quoted from its Supplemental Compliance Program Guidance for Hospitals which explained that: “the general rule of thumb is that any remuneration flowing between hospitals and physicians should be at fair market value. . . . Arrangements under which hospitals . . . provide physicians with items or services for free or less than fair market value . . . or relieve physicians of financial obligations they would otherwise incur . . . pose significant risk.”

The OIG noted the distinction between free items or services that are integrally related to the offering provider’s or supplier’s services and those that are not. For example, the OIG has stated previously, that a free computer provided to a physician by a laboratory would have no independent value to the physician if the computer could only be used to print out test results produced by the laboratory. This is an acceptable practice. In contrast, a free computer that the physician could use for a variety of purposes would have independent value to the physician, and could constitute an illegal inducement for referrals, according to the OIG.

Under the proposed arrangement, access to the interface would be used by physicians only to transmit orders for laboratory and diagnostic services to the hospital and to receive the results of those services. The OIG found that this free interface access would be integrally related to the hospital's services, and would have no independent value to the physicians apart from the services the hospital provides. The OIG, therefore, concluded that the proposed arrangement would not constitute illegal remuneration, and would not violate the anti-kickback statute.

Notably, the OIG's rationale and conclusion in Advisory Opinion Number 12-20 are consistent with the rationale and conclusion of the Centers for Medicare and Medicaid Services ("CMS") in its own Advisory Opinion (Advisory Opinion No. CMS-AO-2008-01) issued on May 28, 2008. Available electronically at www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/downloads/cms-ao-2008-01.pdf. Advisory Opinion No. CMS-AO-2008-01 concluded that a similarly proposed arrangement did not meet the definition of a "compensation arrangement" for purposes of the Stark Law, as defined in Section 1877(h)(1)(A) of the Social Security Act, and was not prohibited.¹

Through Advisory Opinion Number 12-20, available electronically at <https://oig.hhs.gov/fraud/docs/advisoryopinions/2012/AdvOpn12-20.pdf>, the OIG has once again shown its willingness to consider and approve reasonable arrangements that are structured appropriately, between hospitals and physicians. Should you have any questions about this matter or other arrangements among health care providers involving potential sources of referrals, do not hesitate to contact one of the health care attorneys at Schenck, Price, Smith & King LLP.

¹ According to the facts of the CMS Advisory Opinion, the custom software interface was only to be provided to physicians on staff at the applicable hospital. As noted, the OIG Advisory Opinion addressed free electronic interface service to any community physicians who request it.

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