

OIG confuses ambulatory surgical center investors



In an Advisory Opinion on ambulatory surgical centers (ASCs) posted on June 19, 2007, the Department of Health & Human Services Office of Inspector General, caused many in the provider community to scratch their heads. The OIG concluded that a proposed sale to a hospital of equity held by orthopedic surgeons in an ASC posed a heightened risk of fraud and abuse.

The orthopedic surgeons owned 94% of the equity in the multi-specialty ASC and planned to sell a portion of their interest to a local hospital. The hospital was to pay fair market value in cash for its resulting 40% interest, which of course, was more per unit than the surgeons had originally invested.

The OIG determined that the proposed payment by the hospital to the three orthopedic surgeons could be considered payment in exchange for referrals for any and all of the following reasons:

- **Favoritism:** The remaining owners (gastroenterologists and anesthesiologists) did not have the opportunity to sell at the appreciated price;
- **Cash Payment to Surgeons:** The cash payment by the hospital was to the orthopedic surgeons and not to the entity, thus, for example, the ASC would not benefit from enhanced funds;
- **Return on Investment:** The surgeons would receive a higher rate of return on their investment than the hospital would receive and as a result the return on investment for the surgeons would not be directly proportional to the capital invested by other investors.

Not surprisingly, the Advisory Opinion (No. 07-05) has caused serious concern in the ASC community. ASC providers have always assumed that fair market value payment for equity, even if appreciated since the time of original investment, is required under past OIG guidance. In response to recent concern, Chief Counsel to the Inspector General Lewis Morris stated at the American Bar Association Health Law Section program on June 22 that the OIG would take a second look at the opinion. He also noted that the opinion should not be considered an indication of OIG enforcement priorities.

OIG Advisory Opinions only apply to the facts presented. The opinion clearly will impact certain transactions - if some, but not all, the physician investors in an ASC seek to sell their interest to a local hospital it would be wise to seek guidance prior to such a sale.

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