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HEALTHCARE NOTES
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OIG ISSUES DRAFT SUPPLEMENTAL COMPLIANCE PROGRAM GUIDANCE FOR HOSPITALS

On June 8, 2004, the OIG released a draft Supplemental Compliance Program Guidance document for hospitals. This guidance document supplements the OIG's prior compliance program guidance for hospitals issued in 1998. A significant aspect of this document is the OIG's discussion of fraud and abuse risk areas and new compliance recommendations. The OIG also made several recommendations for reviewing the effectiveness of a compliance program that may be incorporated into existing compliance programs for all healthcare providers.

One important aspect of this document is the OIG's detailed discussion of fraud and abuse risk areas that are potentially applicable to all healthcare providers, including: claims and billing issues; potential self-referral and kickback issues; joint ventures; compensation arrangements with physicians; physician recruitment arrangements; malpractice insurance subsidies; waiver of copays and deductibles and other collection issues; free transportation; HIPAA; and professional courtesy.

The submission of accurate claims to Federal health care programs was suggested to be the biggest risk area for hospitals. The OIG stated that the following are evolving risk areas and are "under-appreciated" by hospitals: (i) outpatient procedure coding; (ii) admissions and discharges; (iii) supplemental payment considerations; and (iv) use of information technology.

The OIG recommended that the hospitals should consider the federal physician self-referral law (the "Stark Law") as minimum standards for arrangements between hospitals and physicians. The OIG emphasized that any financial relationship between hospitals and physicians must meet an exception to the Stark Law (e.g., rental agreements, professional service agreements, professional courtesies). CMS included an example where co-ownership of an entity may create an indirect compensation arrangement between the co-owners (e.g., a joint venture between a hospital and a physician to operate a hospice).

The OIG also emphasized that hospitals should be aware of the constraints that the Federal anti-kickback statute places on business arrangements. Similar to previous comments in OIG fraud alerts, the OIG commented that the following factors would be considered in scrutinizing a joint venture: (i) selection and retention of investors for the joint venture; (ii) structure of the joint venture; and (iii) how investments are financed and profits are distributed.

The OIG emphasized that the safe harbors to the anti-kickback statute protect profit distributions to investors, but do not provide regulatory protection for payments by investors to the venture or payments by the venture to other parties such as vendors and contractors.

It was recommended that hospitals should have appropriate processes for documenting reasonable determinations of fair market value and for insuring that needed items and services are furnished. For example, this comment would apply to the situation where a hospital leases space to a physician practice. The document included a common point emphasized in OIG advisory opinions that many legitimate compensation arrangements with physicians may violate the anti-kickback statute if one purpose of the arrangement is to compensation physicians for past or future referrals. Healthcare providers should consider this comment when entering into a compensation arrangement with a referral source.

An important comment for many relationships with hospital-based physicians (e.g., radiologists) was that "in an appropriate context an arrangement that requires a hospital-based physician to perform reasonable administrative or clinical duties directly related to their hospital-based professional services at

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no charge to the hospital would not violate the anti-kickback statute."

The OIG made several comments related to hospital physician recruitment agreements. For example, the OIG commented that the Stark Law exception for physician recruitment arrangements strictly forbids the use of income guarantees that shift group practice overhead or expenses to the hospital or any payment structure that otherwise transfers remuneration to the group practice. The OIG also reiterated that joint recruitment arrangements present a high risk of fraud and abuse and have been the subject of recent government investigations and prosecutions.

The OIG also emphasized that hospitals should regularly review the effectiveness of the hospital's compliance program. As a potential important assessment tool, the OIG included a list of factors in the following areas that are often included in effective compliance programs: designation of a compliance officer and compliance committee; development of policies and standards; development of open lines of communication; appropriate training and education; internal monitoring and auditing; responses to detected deficiencies; and enforcement of disciplinary standards.

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TRANSFER OF A PATIENT COVERED UNDER THE MEDICAL MALPRACTICE ACT

In November of 2003, the Louisiana Fifth Circuit Court of Appeals held that injuries suffered by a patient after being mishandled during a transfer from his wheelchair to his shower chair were not covered under the Louisiana Medical Malpractice Act ("Act"). As a result, the patient's claim against the health care provider was not subject to the $100,000 limitation or "cap" on damages as provided under the Act. Without any discussion of the Court's reasoning, it determined that the subject facts did not involve medical treatment. However, a careful review of the facts, as more fully discussed in a dissenting judge's opinion, suggest a finding to the contrary. The patient was being transferred to his shower chair for showering as required by the patient's "plan of care" to prevent skin breakdown in connection with his incontinence. Such facts clearly fall under the defining elements to find coverage under the Act, that being "treatment related." Despite this, the court held that transfer of the patient under these facts was not related to medical treatment.

The Louisiana Fifth Circuit Court of Appeals had the opportunity to review similar facts in a different case two months later, and corrected the error of its prior ruling. In Williamson v. Hospital Service Dist. No. 1 of Jefferson, 03-1066 (La. App. 5 Cir. 1/27/04), 2004 WL 136088, a patient was injured while she was being transferred in a wheelchair to her vehicle after discharge when a wheel came off the wheelchair. This time the court fully discussed its reasoning and analysis of whether the facts involved medical treatment, and held the injuries were covered under the Act. The court explained that transportation of a patient in a wheelchair as the patient is being discharged from the facility is part of the overall treatment of the patient and is, therefore, "treatment related." When compared with the Court's prior ruling in November and its failure to fully discuss any reasoning as to why the transfer of a patient was not "treatment related," the Williamson case provides persuasive authority that injuries suffered by a patient during transfer are covered under the Act and the $100,000 "cap."

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