

MIXED SIGNALS? COMPLIANCE CONSIDERATIONS FOR THE PROVISION OF FREE ADVANCED PRACTICE PROVIDER SUPPORT

On December 14, 2022, the Office of Inspector General (“OIG”) issued an **advisory opinion** which approved a hospital program (“Arrangement”) to provide advanced practice provider (“APP”) support for inpatients being cared for by primary care physicians (“Participating Physicians”).

Several months later, in May 2023, the Department of Justice (“DOJ”) reached a **settlement of \$29,744,065 with three health care entities** to resolve allegations that they violated the False Claims Act by providing kickbacks to certain referring physicians by providing them with APPs at no cost or below fair market value.

At first glance, different outcomes based on the same type of APP support program suggest contradictory views from the government. However, there are important distinctions between the two arrangements in both structure and purpose.

COMPARATIVE ANALYSIS OF OIG’S ADVISORY OPINION AND DOJ SETTLEMENT

OIG’s **December 2022 advisory opinion** reviewed an Arrangement involving utilization of a hospital’s APPs to perform services traditionally performed by a patient’s attending physician in certain medical units of one of its hospital campuses.

The settlement arose out of a case initially filed in 2015 by a whistleblower who worked at the hospital involved in the settlement. According to the DOJ press release, for several years the hospital allegedly provided the services of employed APPs to 13 physicians at no cost or below fair market value in violation of the Anti-Kickback Statute (“AKS”). The government alleged that the physicians were selected because of their large number of patient referrals to the hospital’s affiliates and that the purpose of these arrangements was to induce the physicians to refer additional Medicare patients.

In its advisory opinion, OIG, at a strict statutory analysis level, considered that the Arrangement implicated the federal AKS because it potentially involved *knowingly* providing “free or below-market-price goods or services to actual or potential referral sources”. However, upon examining the specifics of the Arrangement, OIG deemed the program to be low-risk and declined to impose penalties. In reaching its conclusion, OIG relied on factors in contrast to the facts of the settlement:

The Advisory Opinion	The Settlement
The Arrangement was restricted to two inpatient non-surgical, non-specialty units, operated by primary care physicians, who are viewed to be “low-risk” because the value of their referrals is typically less than the ones from specialist physicians.	The use of the APPs occurred in numerous specialty hospital departments, including Surgery, Neurosurgery and Pediatrics.

The compensation paid to physicians outside of the Arrangement does not reflect any services performed by the mid-level practitioners. Further, participating physicians do not receive payments under the Arrangement, and there are no ancillary agreements otherwise inducing referrals.	The APPs were provided in return for the doctors' promises to use the hospital's facilities to provide care to their patients.
Participating physicians must still perform daily rounds and have the same accountability standards than non-participating physicians.	The APPs services were provided at no cost to the physicians without any accountability of these physicians regarding the services they were offered for free.
Participating physicians can only bill for services they actually performed and have documentation to attest to it, as opposed to suspect arrangements in which hospitals permit mid-level practitioners to provide services to physicians' at no cost, only for physicians to then bill payors — including federal health care programs.	The physicians billed federal health care programs for services they did not actually perform.

PRACTICAL TAKEAWAYS

The comparative analysis of OIG's advisory opinion and of DOJ's settlement reveals material differences between both arrangements. While the advisory opinion provides a roadmap to permit a limited APP support program, the following safeguards are recommended:

- Preference for inpatient primary care units, and not specialty care units;
- Support should not be conditioned upon a promise of referrals from physicians to the organizing entity for the furnishing of support services by the APPs;
- Services of the APPs should never be billed to any health care programs as if the physicians had provided them; and
- Physicians are required to continue to perform their usual duties, in the same manner as other non-participating physicians.

If you have any questions regarding this type of arrangement, please contact:

- **Erin Drummy** at (317) 977-1414 or edrummy@hallrender.com; or
- Your primary Hall Render contact.

Special thanks to Antoine Neumann, summer associate, for his assistance with the preparation of this article.

Hall Render blog posts and articles are intended for informational purposes only. For ethical reasons, Hall Render attorneys cannot give legal advice outside of an attorney-client relationship.