

OIG PUBLISHES REAL ESTATE-RELATED SELF DISCLOSURES NEARING \$2M IN LIABILITY

The Department of Health & Human Services (“HHS”) Office of Inspector General (“OIG”) recently reported five instances in which providers self-disclosed real estate arrangements and then subsequently settled alleged violations of the Civil Monetary Penalty (“CMP”) Law related to those arrangements, which were potentially tainted by kickbacks or Stark violations. The settlements for alleged violations include:

- A California retinal surgery center agreed to pay \$609,000 for allegedly paying remuneration to a physician group in the form of space, equipment and staff lease payments that were above fair market value (“FMV”).
- An Illinois hospital system agreed to pay \$577,000 for allegedly providing free or below-FMV space, equipment, furniture, technology, staff and other services to at least three separate physicians.
- The same Illinois hospital system separately agreed to pay \$174,000 for allegedly providing free space to certain physician practices in another Illinois market.
- A Los Angeles vascular surgeon agreed to pay \$351,000 after allegedly receiving remuneration from a medical center in the form of a sham space lease arrangement. The OIG alleged that the medical center was paying cash to the surgeon to reimburse his rental payments, as well as paying reimbursements for staff salaries and office and medical supplies paid for by the surgeon.
- A Maryland hospital agreed to pay \$69,000 for allegedly paying remuneration to referring physicians in the form of free office space and clinical services.

In enforcement actions and self-disclosures, the government is particularly concerned where an entity provides a referral source with free or below-market space or services, or where the purchaser of services pays above-market remuneration to a referral source, as the implication in either case is that these actions were taken to induce referrals.

THE CMP LAW POST-JARKESY

The **CMP Law** is a federal fraud and abuse statute that applies to physicians, hospitals and other health providers. Similar to the **False Claims Act** and the **Anti-Kickback Statute**, the CMP Law generally prohibits a person from submitting false claims to Medicare or Medicaid and from giving or soliciting anything of value to induce referrals of health care services. Under the CMP Law, OIG may seek varying amounts of civil monetary penalties depending on the nature of the violations, and OIG may exclude providers from participating in federal health care programs.

A recent U.S. Supreme Court decision called into question the administrative enforcement authority of HHS to impose civil monetary penalties and exclusion penalties. In *SEC v. Jarkesy* (“*Jarkesy*”), the Supreme Court generally held that the Seventh Amendment prohibits a government agency from seeking civil penalties in an administrative proceeding without a jury. Although *Jarkesy* was dealing with SEC’s enforcement actions, its holding applies equally to HHS and other government agencies. Moving forward, health care providers facing alleged CMP Law violations should consider new options in light of *Jarkesy*.

PRACTICAL TAKEAWAYS

In order to avoid a real estate-related self-disclosure or government enforcement action, providers should always:

- Ensure that all space, equipment, personnel, supplies and services are accounted for in a written lease, as well as specifying which party will provide and pay for each.
- Ensure that rent is being charged and collected in a commercially reasonable manner.
- Draft and follow a robust real estate compliance program to help catch issues on the front end and to regularly monitor for potential operational concerns.

If an entity is concerned about any existing real estate agreements, a compliance review should be conducted promptly. Any potential violations should be disclosed to CMS (Stark-only violations) or OIG (all other potential violations) to minimize risks and penalties.

If you have additional questions or would like to discuss strategies for establishing a real estate compliance program at your hospital or health care facility to avoid CMP Law violations, please contact:

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