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Four surgeons, ophthalmologists for example, practicing together via a professional corporation plan to build their own ambulatory surgery center (ASC). It goes without saying that they would think that, in order to be compliant, distributions from their ASC must be in proportion to ownership interests, not to the volume or value of their referrals to the facility.

But that's not necessarily true and the reason why presents potential flexibility in structuring ASC deals.

A Bit of Background: The Federal Anti-Kickback Statute (AKS)

As a quick refresher, in general terms, the federal Anti-Kickback Statute (AKS) prohibits the offer of, demand for, payment of, or acceptance of any remuneration for referrals of federally funded healthcare program patients, such as Medicare or Medicaid patients.

The AKS is a criminal statute, and violation constitutes a felony punishable by a fine of up to $100,000, imprisonment for up to 10 years, or, if you're extremely unlucky, both. Conviction also leads to exclusion from federal healthcare programs, including Medicare and Medicaid. It might also lead to civil monetary penalties.

There are statutory exceptions and regulatory "safe harbors" that describe certain arrangements not subject to the AKS because they are unlikely to result in fraud or abuse.

Normal Analysis Versus Unique Analysis

Because of the severity of an AKS violation, physician investments in ASCs are normally structured to fall into one of the four safe harbors aimed directly at ASC investment: (i) Surgeon-Owned ASCs, (ii) Single-Specialty ASCs, (iii) Multi-Specialty ASCs, and (iv) Hospital/Physician-Owned ASCs.

Although each of those safe harbors have particular components, they all require that "the amount of payment to an investor in return for the investment must be directly proportional to the amount of the capital investment (including the fair market value of any pre-operational services rendered) of that investor." Stated inversely, a physician can't be paid based on the volume or value of procedures that he or she brings to the ASC.

But what if an ASC arrangement were structured to comply with a different safe harbor, not one of the four aimed at ASC investment?

That's exactly the situation addressed in OIG Advisory Opinion 23-07.

OIG Advisory Opinion 23-07

For a number of reasons, ASCs are usually structured as entities completely separate from the physician owners' medical practice or practices. In other words, turning to the example we started out with of four ophthalmologists practicing through a medical corporation, the normal structure would be for those four physicians to also be the owners of another entity, usually an LLC, that would own and operate the ASC.

In the facts set out in OIG Advisory Opinion 23-07 (AO 23-07), the proposed structure was different. There, the practice entity, a corporation, of which the physicians were bona fide employees, created two corporate divisions, each of which operated an ASC. In other words, the structure involved a single corporate entity with a medical practice division and two ASC divisions. This is not the same as a "parent–subsidy" structure in which two separate legal entities, the subsidiaries, are owned by the corporate parent, each set up to own and operate one of the two ASCs.

The medical practice requesting the opinion proposed that it would pay its employed physicians base compensation plus, and here's the AKS issue, bonus compensation in the amount of 30% of the practice's net profits from the ASCs' facility fee collections attributable to each physician's ASC procedures during a calendar quarter. In other words, the bonus compensation is tied directly to the volume and value of a physician's procedures at the ASC.

The medical practice proposed that that arrangement would fit into the AKS's statutory exception and regulatory safe harbor for employee compensation arrangements. In general terms, those protected arrangements deal with any amount paid by an employer to a bona fide employee.

In response to the request, the OIG issued a favorable opinion. In other words, the OIG would not challenge the arrangement as violative of the AKS.

Some Important Points for you to Consider

An OIG advisory opinion is not "precedent" and does not provide protection to anyone other than the requestor. That said, it provides a window into how the OIG, the agency charged with enforcing the AKS, views compliance.

Having represented parties in requesting OIG opinions, if you were to engage in a structure similar to that of AO 23-07, you should seriously consider requesting an opinion for your deal.

Lost to compartmentalized thinkers, but evident here from the uniqueness of the corporate division configuration, designing a business structure to meet regulatory challenges in one regard might create unintended consequences in others. For example, mimicking the structure described in AO 23-07 would likely pose hurdles to a subsequent sale of the ASC. There are other extremely significant business and regulatory reverberations as well.

In the event that you'd like to explore ASC structure, let me know.

And, in any event, be extremely careful.

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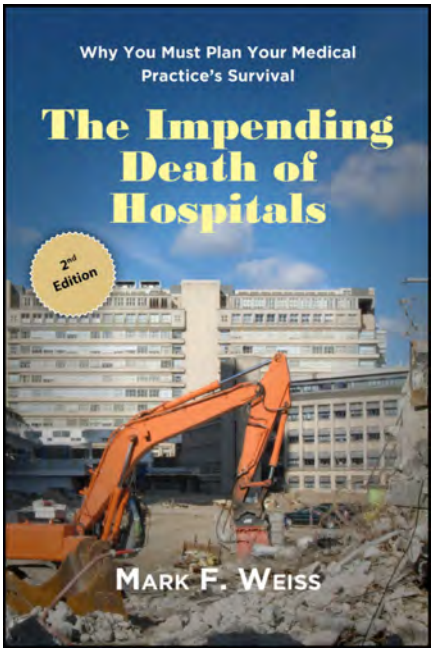

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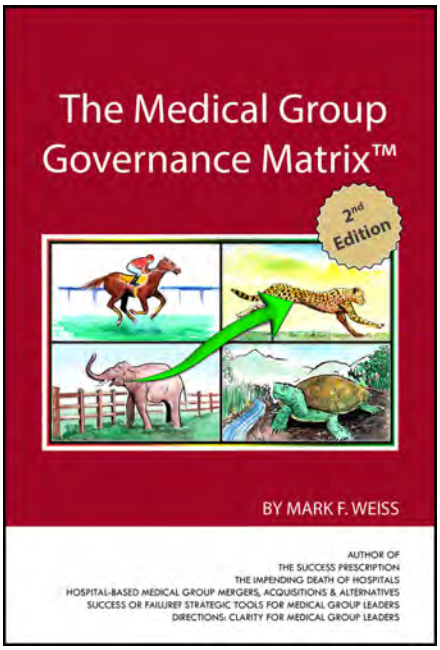

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