

Kusserow on Compliance: Physicians personally face increased enforcement risks for corrupt arrangements

July 13, 2015 by [Richard Kusserow](#)

In a previous blog [post](#), I reported on the new Office of Inspector General (OIG) fraud alert warning physicians that they could face liability under the Anti-Kickback Statute (AKS) ([42 U.S.C. § 1320\(a\)](#)) unless their compensation arrangements, such as medical director agreements, reflect fair market value (FMV) for bona fide services the physicians actually provide. Although improper compensation relationships has remained the [highest enforcement](#) priority for both the OIG and the Department of Justice (DOJ), they tended to focus on the deep pockets of the provider organization for enforcement, not physicians who were benefiting from the arrangement. However, in the last three years there has been a sea change that is placing physicians more at personal risk, as evidenced by a series of new OIG pronouncements regarding physician payments and recent enforcement actions against individual physicians, including those on the following topics: 1) [physician-owned](#) entities; 2) [laboratory payments](#) to referring physicians; and 3) [physician compensation](#) arrangements that may result in significant liability.

The OIG is making it clear that they will be placing more effort on pursuing individual doctors benefiting from corrupt arrangement, not just the organizations that pay them. Physicians should take heed from these OIG warnings before they enter into compensation arrangements such as medical directorships and ensure that those arrangements reflect FMV for bona fide services the physicians actually provide, or risk not only criminal and civil prosecution, but also administrative sanctions that may include monetary penalties and exclusions from federal health care programs.

Physicians involved in arrangements should carefully review the terms and conditions of the compensation agreements before entering into them. Further evidence of this new added focus by the agencies is the fact that the OIG has received increased funding for its enforcement actions. As a result, the OIG will be adding attorneys who will focus on taking administrative enforcement actions against physicians for their part in "corrupt arrangements."

Facts/factors involving physicians arrangement enforcement

- Whistleblowers are the source of most cases, many using the False Claims Act (FCA) ([31 U.S.C. § 3729](#)) quitam provision.
- All claims arising from a corrupt arrangement with physicians are considered tainted, therefore, meaning false and fraudulent.
- Most OIG Corporate Integrity Agreements (CIAs) relate to physician arrangements.
- Enforcement actions take into account payment for the physicians' volume or value of referrals, whether services were not paid for at FMV, and/or whether physicians failed to provide the services called for under the agreements.

Notwithstanding the extremely high enforcement priority on this subject, most compliance officers fail to include this area in serious ongoing monitoring and auditing. In most cases, this reluctance arises out of the fact that arrangements generally involve either inside or outside legal counsel and compliance officers do not feel competent to question them. The fact that there are so many enforcement actions suggests that reliance on this belief would be a mistake. Any organization that has arrangements with physicians should consider having an [outside independent audit](#) of them by experts.

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