Part B Insider (Multispecialty) Coding Alert

COMPLIANCE: Kickbacks Still Stir Up the OIG's Interest

The Office of Inspector General's latest report shows that Stark laws haven't curbed some habits

Despite the recent buzz regarding new OIG targets, the agency's most recent report shows that kickback schemes still dominate their share of audits and sanctions.

The **HHS Office of Inspector General** (OIG) recently released its Health Care Fraud and Abuse Control Program report for 2006. The report touted the program's $2.2 billion in judgments and settlements in fiscal year 2006, adding that -in addition to these enforcement actions, numerous audits, evaluations and other coordinated efforts yielded recoveries of overpaid funds, and prompted changes in federal health care programs that reduce vulnerability to fraud. In financial year 2006, HHS collected more than $378.4 million in HHS/OIG recommended recoveries.-

The report covers several highlights of the OIG's 2006 recoveries, which deal with everything from physicians getting patients addicted to narcotics to practices submitting fake charges to unlicensed personnel operating as physicians.

Throughout the report, the OIG refers to instances of anti-kickback violations, occurring among insurers, hospitals, equipment suppliers, physician practices, medical device manufacturers and clinics. In addition to the higher-profile cases, smaller practices are more likely to encounter some basic arrangements.

One of the more common anti-kickback arrangements involves space-sharing agreements. -This is an area where the OIG issued a specific Fraud Alert on the subject of physicians who sublease space to therapy practices, the principles of which are generally applicable to various arrangements between tenants and subtenants,- says **Howard L. Sollins, Esq.,** of **Ober Kaler** in Baltimore.

-Certain common arrangements that are ordinarily customary in a general business context can be problematic in the physician context,- Sollins says. -For instance, in some commercial lease agreements, a landlord gets a percentage of the revenues of the subtenant. You may see that in a retail location, but if you had two referring healthcare providers, one taking a percentage of the other's revenues, that could be a problem.-

The OIG's February 2000 Fraud Alert addresses various rental agreements that it deems questionable, such as rental amounts that vary based on the number of referrals, or rental agreements on unoccupied spaces. The Fraud Alert also offers -safe harbor- criteria to protect legitimate arrangements.

Avoid this misstep: One practice's medical director recently contacted the Insider to explain that he requires the physical therapist (PT) who rents space from him to pay more in rent than he would charge other tenants because he wants to make sure the OIG doesn't view him as providing a referral inducement.

-If a physician practice has determined the fair market value of the space rental for a PT subleasing space, there is no reason to have any variance--up or down-- from the fair market value,- says **David C. Harlow, Esq.,** of **The Harlow Group** in Newton, Mass. -Over-charging may be just as problematic as undercharging, given the right set of circumstances,- he says.

For example, the practice in the example above -seems to be focused entirely on steering clear of providing impermissible remuneration to a referral source,- Harlow says. -However, one must also consider the very real possibility that some referrals flow in the other direction (physician to PT). In that case, the overpayment of rent by the PT to the physician practice may be viewed as an inducement to refer patients to the PT.-

In addition, such arrangements often include more than just office space. For example, the sublessee--the PT in the example above, -is likely also receiving utilities and building services, which are likely covered by the lease and sublease payments, and may also be receiving other goods and services whose value has not been quantified, such as physician practice front office staff assisting with the day-to-day operations of the PT office practice on an ad hoc basis, linens,other consumables, etc.,- Harlow says. -All of these goods and services must be quantified, priced and paid for in order to steer clear of prohibited inducements to refer."