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OIG ADVISORY OPINION: WILL CLARIFICATION ON GROUP PRACTICE DEFINITION CREATE ADDITIONAL OPPORTUNITIES FOR PHYSICIAN INVESTORS?

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A recent Advisory Opinion[1] ("AO") offers clarification on the group practice definition for purposes of Section 1877(h)(4) of the Social Security Act and 42 CFR §411.352 (collectively, the "Physician Self-Referral Law"). Under the Physician Self-Referral Law, a physician may not refer patients to an entity for certain designated health services if the physician (or a member of the physician's immediate family) has a financial relationship with that entity, unless an enumerated exception is met. Such exceptions include the physician services exception and in-office ancillary services exception.[2] In order to comply with such exceptions, certain requirements must be satisfied, one of which is the requirement that the referrals take place between physicians who are members of the same group practice. However, the law states that a group practice "must consist of a single legal entity operating primarily for the purpose of being a physician group practice."[3]

In the AO, Requestor, a physician practice, was seeking a determination as to whether or not it would continue to qualify as a group practice under the Physician Self-Referral Law following the acquisition of two subsidiary physician practices, which themselves did not meet the requirements to be considered a group practice. In affirming Requestor's continued group practice status following the acquisition, the AO highlighted the following:

- Requestor operates as a physician practice and satisfies all of the necessary requirements to qualify as a group practice under the Physician Self-Referral Law;
- Post-acquisition, all of the clinical employees and contractors of the subsidiaries would become employees or contractors of Requestor and be designated to work at the subsidiaries' practice locations; and
- All revenues and expenses of the subsidiaries would become the revenues and expenses of Requestor, even though the subsidiaries would (i) continue to contract directly and remain credentialed/enrolled with Medicare and other payors and health plans, and (ii) use billing numbers assigned to them to bill payors and health plans (including Medicare) for designated health services furnished to patients covered by such payors and health plans.

[1] Advisory Opinion No. CMS-AO-2021-01
[2] 42 CFR § 411.355(a)-(b).
[3] 42 CFR § 411.352(a).

In closing, the AO concluded that "furnishing designated health services through a wholly-owned subsidiary entity that is a physician practice but does not itself qualify as a group practice under 42 CFR § 411.352 would not preclude [the group practice's] compliance with the requirement at 42 CFR § 411.352(a) that a group practice is a single legal entity."[4]

By confirming that furnishing designated health services through wholly-owned subsidiary physician practices would not preclude compliance with the single legal entity requirement found at 42 CFR § 411.352(a), physician investors may have greater assurances that, post-acquisition, these newly formed entities can meet an applicable exception under the Physician Self-Referral Law, including the in-office ancillary services exception. With a sole focus on healthcare transactions, HealthCare Appraisers has the knowledge and experience to assist with all of your fair market value needs related to the acquisition of physician practices, including unmatched real estate, capital assets, and business valuation services.

[4] *See* footnote 1 *supra*. Further, we note that the AO did not indicate whether Requestor would be able to meet the in-office ancillary services exception post-acquisition.