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Compliance Today - September 2019
Reviewing and monitoring healthcare real estate arrangements with referral sources

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The Patient Protection and Affordable Care Act (Obamacare) requires all Medicare and Medicaid providers to have compliance programs.[1],[2] On May 17, 2017, the Department of Health and Human Services, Office of Inspector General (OIG) issued "Measuring Compliance Program Effectiveness – A Resource Guide" (the Compliance Guide), which serves as a guide for healthcare organizations when assessing the adequacy and effectiveness of their compliance programs.

The Compliance Guide identifies seven key areas of an effective compliance program:

- Standards, policies, and procedures
- Compliance program administration
- Screening and evaluation of employees, physicians, vendors, and other agents
- Communication, education, and training on compliance issues
- Monitoring, auditing, and internal reporting systems
- Discipline for noncompliance
- Investigations and remedial measures

When building an effective compliance program, in addition to making sure that each of these seven key areas is adequately addressed, it is important to ensure that the program is designed to address all types of business arrangements that can expose health systems to regulatory risks. One area of health systems' compliance programs that is often overlooked involves real estate arrangements between health systems and referral sources. Real estate arrangements with referral sources can pose regulatory risks for health systems. Therefore, health systems need to ensure that their compliance programs and the seven key areas identified above address real estate arrangements as well. Although each of the seven key areas of an effective compliance program is equally important, this paper will focus on structuring and administering a review and monitoring program for healthcare real estate arrangements.

Regulatory overview

Real estate arrangements between health systems and physicians implicate the applicable healthcare laws, because those arrangements have the potential to result in financial benefits to both physicians and health systems at the expense of federal healthcare funds. For example, a physician could receive a financial benefit

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from a hospital by paying less for medical office space than the market would otherwise dictate. The theory is that in exchange for providing a physician with medical office space at rates below fair market value (FMV), a hospital could potentially recoup the money it is losing on that lease arrangement by relying on subsequent revenue from that physician's downstream patient referrals for services that will ultimately be paid for by Medicare. Similar issues exist with real estate purchase and sale transactions between health systems and referral sources. With both types of transactions, payment for patient referrals is strictly prohibited by the applicable statutes and regulations and can serve as a predicate for whistleblower healthcare fraud lawsuits against health systems.

Regulatory authorities understand that real estate arrangements between health systems and physicians are inevitable and have, as a result, created rules on how those real estate arrangements should be structured and administered. As it relates to real estate lease arrangements, to avoid violating the Stark Law, lease arrangements between referring physicians and health systems must comply with the rental of office space exception (the Lease Exception) under the Stark Law, which generally consists of the following elements:

1. Lease must be in writing, signed by all parties, and adequately describe the leased premises.
2. Term of lease must not be less than one year.
3. Leased premises must not exceed that which is reasonable and necessary for the legitimate business purposes of the lease arrangement.
4. Leased space must be used exclusively by lessee.
5. Rent must be set in advance and consistent with fair market value.
6. The rental charges are not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties, using a formula based on a percentage of the revenue attributable to the services performed or business generated in the office space, or per-unit-of-service rental charges; and
7. The lease arrangement would be commercially reasonable even if no referrals were made between the lessee and the lessor.[3],[4]

The Anti-Kickback Statute (AKS) also contains a voluntary space rental safe harbor for real estate lease arrangements involving referral sources, which consists of elements that are similar to the Lease Exception under the Stark Law outlined above.[5]

Similarly, isolated financial transactions between health systems and referral sources involving purchase and sale of real estate property, for example, must be structured in accordance with the following elements (the Isolated Transactions Exception):

1. The amount of remuneration under the isolated transaction must be consistent with the FMV of the transaction and not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician or other business generated between the parties.
2. The remuneration must be provided under an arrangement that would be commercially reasonable even if the physician made no referrals to the entity.
3. There are no additional transactions between the parties for six months after the isolated transaction, except for transactions that are specifically excepted under the other provisions of the Stark Law and

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except for commercially reasonable post-closing adjustments that do not take into account (directly or indirectly) the volume or value of referrals or other business generated by the referring physician.[6],[7]

Numerous compliance pitfalls associated with real estate arrangements exist, and they can be generally classified as "transactional" or "operational." Transactional compliance pitfalls stem from the real estate arrangement itself and the specific structure of the transaction. In other words, the structured real estate arrangement fails to comport with the elements of the applicable Stark Law exception, such as the Lease Exception or the Isolated Transactions Exception. Some examples of transactional compliance pitfalls in the context of healthcare real estate lease arrangements include rent rates above or below FMV, leases not being in writing or signed, the term of the lease is less than a year, and the leased premises not being accurately defined.

Operational compliance pitfalls stem from the subsequent administration, or lack thereof, of the real estate arrangements. These types of pitfalls are typically prevalent in real estate lease arrangements between health systems and referral sources, which have been structured correctly and in accordance with the requisite elements of the Lease Exception, but which have not been administered accurately and in accordance with their terms. Some examples of operational compliance pitfalls for real estate lease arrangements include not properly accounting for rent escalators, failure to collect rent, reconciliation of operating expenses, provision of off-lease benefits, and space creep.

Both types of compliance pitfalls can expose health systems to significant liability under the law. Therefore, health systems should regularly review and monitor their real estate arrangements with referral sources to ensure that they are fully compliant with the applicable healthcare statutes and regulations. One way to ensure that this is done is to implement a healthcare real estate arrangement review and monitoring program.

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