NELSON HARDIMAN
HEALTHCARE LAWYERS

# OIG Advisory Opinion Holds Medicare Carve Outs Are Not Insulated From Anti-Kickback Prohibitions

On June 21, 2011 the Office of Inspector General (OIG) released an advisory opinion stating that the "carve out" of federal business does not protect a payment arrangement from scrutiny under the Anti-Kickback Statute.[1] According to the OIG, such arrangements implicate and may violate the Anti-Kickback Statute by disguising remuneration for federal business through the payment of amounts purportedly related to non-federal business.

The OIG has expressed a longstanding concern about arrangements that "carve out" federal health care program beneficiaries or business generated by federal health care programs from otherwise questionable financial arrangements. The Advisory Opinion involved an arrangement between a Durable Medical Equipment (DME) Supplier and an Independent Diagnostic Testing Facility (IDTF) that was structured to "carve out" federal Health Care beneficiaries from the payment arrangement.There, IDTFs participating in the arrangement could still influence referrals of federal health care program beneficiaries to a requestor for DME. The OIG stated that a nexus existed between a requestor's payments to the IDTF for services provided to non-federal patients and referrals to the requestor of federally insured patients, implicating the Anti-Kickback Statute.

Given the widespread practice of "carving out" Medicare business in healthcare contracts, healthcare providers should take this advisory opinion as a warning sign and make a point of reviewing their contracts for compliance with state and federal restrictions on self-referral and inducements to refer (*i.e.* kickbacks). Monitoring these issues is an essential part of any effective compliance and ethics program.

---

[1] http://oig.hhs.gov/fraud/docs/advisoryopinions/2011/AdvOpn11-08.pdf