

Blog Post

# Anti-Kickback Statute Implications of Physician Estate Planning: OIG Approves Retirement Plan Involving ASC Ownership Transfers

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On March 9, 2026, the U.S. Department of Health and Human Services Office of Inspector General (OIG) issued a [favorable advisory opinion](#) regarding a retiring physician's transfer of ownership interests in a Medicare-certified ambulatory surgical center (ASC) as part of his retirement plan.

At issue was whether the three-phase retirement plan of the physician owner of the ASC would violate the federal Anti-Kickback Statute (AKS). The OIG concluded that it would not impose administrative sanctions even though some aspects of the retirement plan would generate prohibited remuneration if the requisite intent were present.

Although the advisory opinion applies only to the specific ASC that requested the opinion, it offers valuable insight into how the OIG views retirement plans that involve ownership transfers that could implicate the AKS and do not fall within a safe harbor.

## What Was Proposed?

In the first phase of the retirement plan, the physician owner would: (a) gift an ownership

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interest in the ASC to his non-physician wife, (b) provide his two children—who are themselves physicians engaged in the same specialty as the physician owner—the option to purchase ownership interests in the ASC at fair market value, (c) retain an ownership interest in the ASC for himself, and (d) retain an ownership interest for potential future investment by other physicians.

During the second phase, the physician owner would retire from the practice of medicine and, upon the approval of the ASC's board, ownership interests in the ASC would be offered for purchase at fair market value to outside physician investors who could be engaged in the same specialty as the physician owner and his children or another specialty.

The third phase would take place following the death of the physician and his wife. Upon their deaths, their respective ownership interests in the ASC would transfer as a gift to their two children.

## What Did the OIG Decide?

### Phase 1

#### *Transfer of Ownership Interests to Non-Physician Spouse*

The OIG concluded that the gift of an ownership interest in the ASC to the physician owner's non-physician wife would not satisfy an AKS safe harbor. Yet, the OIG concluded that this gift is sufficiently low risk for a favorable advisory opinion because the wife would not maintain any role in the healthcare industry and is not in a position to refer or influence referrals to the ASC. Further, the OIG noted that the proposed arrangement is part of a bona fide estate planning strategy based on trust documents, family business plans, and other documents illustrating the long-term succession plan of the physician owner.

### *Option for Physician Children to Purchase Ownership Interests*

Additionally, the OIG concluded that the option for the physician owner's children to purchase ownership interests in the ASC would not satisfy an AKS safe harbor. Nonetheless, the OIG concluded that the risk of fraud and abuse by this step in the retirement plan is sufficiently low for the OIG to issue a favorable advisory opinion because the ownership interests would be purchased at fair market value as part of a documented bona fide estate planning strategy.

### *Financial Distributions*

The OIG also considered whether financial distributions made by the ASC to the physician owner's wife and children after they become owners of ASC would implicate the AKS. The OIG concluded that these distributions would be protected under the single-specialty ASC safe harbor because the ASC, as the requestor of the advisory opinion, certified that each element of the safe harbor would be satisfied. For example, since the children are physicians, the terms of the offer of the investment interests would not be related to the previous or expected volume of referrals to the ASC, and at least one-third of each of the children's income over the past 12-month period would be derived from the performance of ASC procedures.

## Phase 2

### *Offer of Ownership Interests to Future Physician Investors*

The OIG concluded that the offer of ownership interests to unrelated physician investors would not satisfy a safe harbor. However, the OIG found that the risk of fraud and abuse is sufficiently low under the AKS for a favorable advisory opinion because the future investors would purchase the ownership

interests at fair market value as part of a documented bona fide estate planning strategy.

### *Financial Distributions*

Further, the OIG noted that financial distributions made to any future physician investors unrelated to the owner of the ASC would be protected by the multi-specialty ASC safe harbor because the requestor certified that all elements of the safe harbor would be satisfied. For instance, the requestor certified that the terms for the investment interests would not be related to past or expected volumes of referrals, at least one-third of each of the physician investors' annual income would be derived from the performance of ASC procedures, and at least one-third of the procedures performed by each physician investor for the previous fiscal year or previous 12-month period would be performed at the ASC.

### *Important Certifications by Physician Owner*

The OIG also pointed out that, upon retirement, the physician owner of the ASC would provide a written certification that he would not directly or indirectly influence referrals to the ASC. According to the OIG, this certification was reinforced by the fact that the physician owner does not intend to formally transition or assign his patient panel to his children. Instead, the physician owner will gradually transition out of active clinical practice over several years.

## Phase 3

### *Gift of Ownership Interests to Physician Children*

Although the gift of ownership interests in the ASC from the physician owner and his wife upon death would not satisfy an AKS safe harbor, the OIG concluded that the gift would be sufficiently low risk to issue a favorable advisory opinion because the gift would be part of a bona fide estate planning strategy

documented by appropriate documentation, such as trust documents and a family business plan.

The OIG noted that future financial distributions from the ASC to the physician children based on the gifted ownership interests would satisfy the safe harbor for multi-specialty ASCs.

## Takeaways for Physician Estate Planning

Although the advisory opinion applies only to the requesting ASC, it offers several lessons for estate planning by physicians who hold ownership interests in ASCs.

First, retiring physicians should be aware that retirement plans involving the transfer of ownership interests in an ASC can implicate the federal AKS and might not satisfy an existing AKS safe harbor. This risk can occur even if the beneficiary of the gift of an ownership interest in an ASC is not a physician. Important criteria for assessing the risk of a transfer of ASC ownership interests include whether the beneficiary of the gift is employed by the ASC and whether the beneficiary is in a position to make or influence referrals to the ASC. The OIG cautions that marketing or administrative personnel can be referral sources. Thus, the risk of a gift made to a non-physician spouse could hinge upon whether the spouse is employed by the ASC and the nature of the spouse's employment.

Second, because the AKS is an intent-based statute, it is important to document that the gift is part of a bona fide estate planning strategy and is not intended to induce or reward referrals to the ASC. Such documentation can include trust documents and a family business plan.

Third, to the extent the retirement plan involves the option to purchase ownership interests in the ASC, those ownership interests should be purchased at fair market value, as determined by an independent valuation consulting firm.

Fourth, after the retirement plan is implemented, it is important that the ownership interests satisfy an AKS safe harbor, such as the single-specialty or multi-specialty ASC safe harbors. This means that, among other things, the following elements should be satisfied:

- The terms on which an investment interest is offered to an investor must not be related to the previous or expected volume of referrals, services furnished, or the amount of business otherwise generated from that investor to the entity.
- At least one-third of each physician investor's medical practice income from all sources for the previous fiscal year or previous 12-month period must be derived from the physician's performance of ASC procedures.

Additionally, investors who are not physicians must not be employed by the ASC or by any investor, must not be in a position to provide items or services to the ASC or any of its investors, and must not be in a position to make or influence referrals directly or indirectly to the entity or any of its investors. This means that if the retiring physician will maintain an ownership interest in the ASC after retirement, the retiring physician should not directly or indirectly influence referrals. As such, a retiring physician who will retain an ownership interest in an ASC should not formally transition or assign their patient panels to other physician owners of the ASC.

Retiring physicians should be mindful of the AKS implications of their retirement plans. Akerman's Healthcare Practice Group is available to answer any questions you may have.

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