

CLIENT ADVISORY

OIG Approves Arrangement for Hospital to Share Percentage of Pay-for-Performance Bonuses with a Physician-Owned Entity

On October 14, 2008, the Office of Inspector General (“OIG”) of the United States Department of Health and Human Services issued Advisory Opinion 08-16 (the “Advisory Opinion”) which approves a hospital’s proposal to share a percentage of pay-for-performance program bonuses with a physician-owned entity. The OIG concluded that the proposed arrangement would potentially constitute grounds for sanctions under both the Civil Monetary Penalty¹ (“CMP”) provision of the Social Security Act and the Federal Anti-Kickback Statute². However, the OIG held that based on the limitations and structure of the arrangement, the OIG would not impose administrative sanctions under either regulation.

The Advisory Opinion was requested by a non-profit corporation that owns an acute care general hospital (“Hospital”). The Hospital currently participates in a pay-for-performance program implemented by a private insurer (“Insurer”). In the existing program, the Insurer pays an annual base compensation to the Hospital for patient care as well as bonus compensation, determined by the extent to which the Hospital meets certain performance standards for quality and efficiency. The bonus is calculated by a percentage of the base compensation, the maximum of which is four (4) percent for the 2008 year.

The quality of care standards for the bonus compensation derive from the “Quality Targets” described in the Specifications Manual for National Hospital Quality Measures published by the Joint Commission. Compliance with the Quality Targets for calculating bonus compensation is based on all of the Hospital’s inpatients having a designated condition or procedure, including Medicare and Medicaid beneficiaries. Except where contraindicated for a certain patient, every standard for the condition or procedure must be met in order to receive full credit and compensation under the existing bonus arrangement.

Under the proposed arrangement at issue in the Advisory Opinion, the Hospital would enter a quality enhancement professional services agreement with a professional limited liability company (“Physician Entity”). The Insurer is not a party to the proposed arrangement. The members of the Physician Entity are licensed to practice medicine or osteopathic medicine and surgery in the state of the Hospital, have been members in good standing of the Hospital’s active medical staff for at least one year, and meet the qualifications of the Physician Entity Operating Agreement. Finally, each physician joining the Physician Entity will make an equal capital contribution in its formation, the aggregate of which will provide the Physician Entity’s working capital. The proposed agreement, which is for an initial term of three years, requires members of the Physician Entity to work to ensure the Quality Targets are achieved at the Hospital. In return, the Hospital will pay the Physician Entity a percentage of the bonus compensation earned for that year. The percentage will be negotiated annually but will never exceed fifty (50) percent of the total bonus compensation received by the Hospital from the Insurer. The Physician Entity will then distribute these earnings to its members on a *per capita* basis.

¹ Social Security Act §1128A(b)(1)-(2).

² Social Security Act §1128B(b).

OIG Legal Analysis

Civil Monetary Penalties

The CMP provides for the imposition of penalties against any hospital that knowingly makes a payment directly or indirectly to a physician (and any physician that receives that payment) as an inducement to reduce or limit items or services to Federal health care beneficiaries under the physician's direct care. Although the Quality Targets of the program are implemented to improve patient care, the OIG concluded that compensation from the Hospital to the Physician Entity for achieving the Quality Targets may implicate the CMP by inducing physicians to reduce or limit use of items or services provided to Federal health care beneficiaries. Despite this conclusion, the OIG held that it would not seek sanctions based on the safeguards and limitations structured into the agreement. Those protections include the following:

- There is credible medical support for the position that the agreement has the potential to improve patient care and is unlikely to have adverse effects on it.
- There will be no incentive for a physician to apply a specific standard in medically inappropriate circumstances because bonus compensation from the Insurer to the Hospital is not reduced as a result of a specific standard not being met if the standard is contraindicated with regard to that patient.
- The Quality Targets are reasonably related to the practices and patient population of the Hospital and the procedures involved in the Quality Targets are routinely used at the Hospital.
- The performance measures that could result in compensation to the Physician Entity are clearly and separately identified and affected patients will be notified. The transparency allows for public scrutiny and physician accountability for any adverse affects that may occur.
- The Quality Targets will be monitored throughout the term to protect against inappropriate reductions or limitations in patient care or services.

The OIG emphasized in the Advisory Opinion that the Quality Targets are those promoted by the Centers for Medicare and Medicaid Services and the Joint Commission and therefore carry a presumption of legitimacy.

Anti-Kickback Statute

The Anti-Kickback Statute prohibits the knowing and willful offer, payment, solicitation, or receipt of any remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program.³ The statute has been interpreted to cover many arrangements where one purpose of the remuneration was to obtain referrals or services to induce further referrals.⁴ The statute provides that "remuneration" includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind. Violation of this statute is a felony punishable by fine, imprisonment or both. The OIG may also initiate proceedings in order to exclude the violating party from participation in Federal health care programs.

The OIG ruled that the Anti-Kickback Safe Harbor for personal services and management contracts may apply to this agreement but then went on to find that this agreement fails to meet the requirement that the aggregate compensation paid for the services be set in advance. However, the opinion noted that failure to meet a safe harbor does not mean the arrangement is violative, but rather, the agreement must be analyzed on a case-by-case basis. In this proposal, the OIG focused on the concern that the agreement may encourage physicians to join the Hospital Medical staff and to admit additional patients in order to increase compensation. Specifically, the OIG concluded that the agreement may result in illegal remuneration under the Anti-Kickback Statute if the intent to induce referrals is present. However, the Advisory Opinion held that the OIG would not impose sanctions

³ Social Security Act §1128B(b).

⁴ See *United States v. Kats*, 871 F.2d 105 (9th Cir. 1989); *United States v. Gerber*, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985).

under the Anti-Kickback Statute based on the following safeguards of the agreement which reduce the likelihood of inducing referrals:

- Membership in the Physician Entity is limited to physicians who have been on the active medical staff for at least one year and compensation from the agreement is subject to a cap tied to the base compensation paid by the Insurer to the Hospital in the base year.
- The Hospital will monitor implementation of the Quality Targets to protect against changes in referral patterns resulting from efforts to meet the targets.
- *Per Capita* distribution among the members of the Physician Entity will reduce the risk that the agreement might be used to reward individual physicians who refer patients to the Hospital.
- The transparency of the agreement will help ensure that its purpose is to improve quality rather than reward referrals.
- The oversight role of the Insurer will provide a safeguard to ensure payments to the physicians will be based on achieving the Quality Targets, rather than on patient referrals.
- The arrangement will be implemented through a three-year contract between the Hospital and the Physician Entity, and thus will be limited in duration.

Based on the totality of these limitations, the OIG concluded that the proposed agreement would pose a low risk of fraud or abuse under the Federal Anti-Kickback Statute.

Conclusion

The Advisory Opinion is unique in that it is the first time that the OIG has publicly ruled that an arrangement in which a hospital pays a physician-owned entity a percentage of bonus compensation received from a private insurer for meeting certain quality standards is permissible with the appropriate safeguards to protect from fraud and abuse. Those safeguards must ensure that no compensation is rewarded or used to induce patient referrals or to reduce the quality of patient care. Based on the limitations provided by the requesting Hospital in the Advisory Opinion, the OIG concluded that it would not seek sanctions under the CMP or the Anti-Kickback Statute as the arrangement poses a small risk for fraud or improper payments.

If you should have any questions or concerns regarding the OIG's Advisory Opinion, please do not hesitate to contact any of the attorneys at The Rogers Law Firm at 617-723-1100.

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