

PUBLICATION

OIG Approves Medigap Policy Contracts with Preferred Hospital Networks [Ober|Kaler]

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On February 20, the U.S. Department of Health & Human Services, Office of the Inspector General (OIG) released [Advisory Opinion 14-02 \[PDF\]](#), concerning the use of preferred hospital networks as part of certain Medicare Supplemental Health Insurance (Medigap) policies. The OIG believed that the proposed arrangement could potentially generate prohibited remuneration under the antikickback statute given the requisite intent, but nonetheless determined that it would not impose administrative sanctions against the requestor in connection with the proposed arrangement.

The requestor of the Advisory Opinion was a licensed offeror of health insurance products, including Medigap policies. The requestor proposed to implement arrangements with one or more preferred provider organizations (PPOs) that contract with hospitals throughout the county (Network Hospitals) for all of the requestor's Medigap plans that cover Part A deductibles (the Medigap Plans). The requestor provided that the PPOs were free to contract with any accredited and Medicare-certified hospital that complies with the requirements of applicable state laws to discount the Part A deductible for Medigap Plan policyholders (the Policyholders). Through those arrangements, the requestor would indirectly contract with hospitals for discounts of up to 100 percent on the Medicare Part A inpatient hospital deductibles. Upon receipt of the discount, the requestor would pay the corresponding PPO a fee for administrative services. The requestor noted that Policyholders would not be penalized for the use of non-Network Hospitals in any way, and the proposed arrangement would not affect the Policyholders' liability for payments for covered services, regardless of the Network status of the hospital.

The requestor proposed to return a portion of the savings resulting from the arrangement to any Policyholder who had an inpatient stay at a Network Hospital, via a \$100 reduction in the amount of the Policyholder's upcoming renewal premium. The requestor's Medigap marketing material would address the return of a portion of the savings, and would identify Network Hospitals. The requestor also proposed to provide Policyholders with membership cards and documents bearing an icon that would indicate the Medigap Plan's participation in the network. Policyholders would receive semiannual updates regarding hospital availability. Lastly, the requestor proposed to reflect any savings realized through the proposed arrangement in its annual experience exhibits filed with state insurance departments, such that they would be considered when state insurance departments review and approve the rates.

Antikickback Statute

First, the OIG analyzed the agreement under the antikickback statute and found that the statute may be implicated because waivers of Medicare cost-sharing amounts and the relief of a financial obligation may qualify as prohibited remuneration. Under the proposed arrangement, the discounts function to shield the requestor from being liable for the full deductible and thereby relieve the requestor of a financial obligation. The OIG also found that safe harbor protection could not extend to the proposed arrangement. The safe harbor for waivers of beneficiary coinsurance and deductible amounts offers no protection because it specifically excludes such waivers when they are built into agreements with insurers. 42 C.F.R. § 1001.952(k)(1)(iii). Likewise, the arrangement cannot fall under the safe harbor for reduced premium amounts offered by health

plans because the premium discounts would be offered only to enrollees who choose Network Hospitals, not to *all* enrollees as is required by the safe harbor. 42 C.F.R. § 1001.952(l)(1).

Because it falls outside the protections of the safe harbors, the OIG scrutinized the arrangement and found that in combination with Medigap coverage, the discounts and premium credits offered would present a sufficiently low risk of fraud or abuse under the antikickback statute for five reasons:

1. Part A payments for inpatient services are fixed and would be unaffected by the discounts and premium credits.
2. The proposed arrangement was unlikely to affect an increase in utilization because Policyholders do not see the discounts, which cover only the portion of a Policyholder's cost-sharing obligation that would otherwise be covered by the supplemental insurance. The OIG repeated its long-held view that the waiver of fees for inpatient services is unlikely to result in significant increases in utilization.
3. Membership in a contracting PPO would be generally unrestricted such that the proposed arrangement would not unfairly affect competition between hospitals.
4. Because physicians and surgeons would not receive remuneration under the arrangement, it is unlikely to affect professional medical judgment.
5. The transparent nature of the proposed arrangement makes clear to Policyholders that they may choose any hospital without being penalized.

Civil Monetary Penalties Law

Next, the OIG analyzed the proposed arrangement under the Civil Monetary Penalties Law, and found that the premium credits implicate the prohibition on beneficiary inducements because the credits would be offered to induce Policyholders to select a particular Network Hospital from a larger group of eligible providers. It is interesting to note that even though the benefit to the patients under this scenario is a future premium reduction, the OIG analyzes this benefit as though it were a copay or deductible waiver. The OIG observed that for the purposes of the beneficiary inducement prohibition, differentials in coinsurance and deductible amounts as part of a benefit design are excluded from the definition of remuneration so long as the differentials meet certain requirements. Section 1128A(i)(6)(C). The OIG explained that the proposed premium credit would function with the same purpose and result as the differentials in coinsurance and deductible amounts. The OIG also noted the potential cost-reducing effect the proposed arrangement may have for Policyholders, and emphasized that because the savings would be reported to state insurance rate-setting regulators, the proposed arrangement may lower costs for all Policyholders, not just those using Network Hospitals. Finally, the OIG concluded that the premium credit would present a sufficiently low risk of fraud or abuse under the Civil Monetary Penalties Law.

Ober|Kaler Comments

The analysis summarized above served as the basis for the OIG's conclusion that it would not impose sanctions under the antikickback statute and the Civil Monetary Penalties Law for the proposed arrangement. This is not the OIG's first advisory opinion regarding use of preferred hospital networks and Medigap policies, but the arrangement it addresses differs from previous proposed arrangements reviewed by the OIG (Advisory Opinions [13-12 \[PDF\]](#) and [13-06 \[PDF\]](#)) because it structures the benefit to the Policyholders as a premium discount in the next renewal premium, and not in the next monthly premium owed to the requestor. Insurers offering Medigap policies should reflect on the flexibility that this Advisory Opinion offers them.