PUBLICATION

OIG Advisory Opinion 18-07 Permits GPO Expansion to Serve Wholly Owned Members

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In Advisory Opinion No. 18-07, issued July 30, 2018, the OIG permitted a group purchasing organization (GPO) to serve health care facilities owned by the same parent organization as the GPO. While acknowledging that the arrangement did not fully satisfy all of the requirements of the GPO safe harbor to the Anti-Kickback Statute (AKS), the OIG determined there was an acceptably low risk of fraud and abuse based on the GPO's longstanding operation and the facts presented by the GPO.

Factual Background

The advisory opinion was requested by a GPO that has provided hospital group purchasing services to its members for more than 20 years. As a result of a series of corporate changes, the GPO is indirectly owned by a parent company that also owns 31 hospitals. The parent company is a public company and the hospitals it owns are separate legal entities located across multiple states. The GPO currently contracts with vendors and negotiates discounts on behalf of 134 member hospitals and other health care facilities. The GPO's current members do not have a direct or indirect ownership relationship with the GPO, and the GPO's current arrangement meets the requirements of the GPO safe harbor.

In addition to standard hospital supplies and equipment, the GPO negotiates discounts on specialized products and services, including technology platforms, staffing and physician services. While the GPO contracts with vendors for discounts on these specialized products and services, it does not enter into contracts with its vendors to provide any products or services. Each member enters into a separate agreement with the vendor for the actual products and services to be provided. The OIG also noted that with three exceptions, the GPO does not share GPO fees with its members.

Proposed Arrangement

Under the proposed arrangement, the GPO would now offer its services to hospitals owned by its parent organization. These affiliated health care facilities would represent 35 percent of the GPO's membership and an estimated 20 percent of purchasing volume. All members, whether commonly owned or unrelated, would be subject to the same contract terms and conditions.

Legal Analysis

The administrative fees paid by vendors to a GPO potentially implicate the AKS because they could be used as payments to induce referrals of federal health care business. The GPO safe harbor excludes such GPO fees from the definition of *remuneration* under the AKS if certain requirements are met. To meet these requirements, the GPO must have a written agreement with each member that sets forth the fees that vendors will pay to the GPO and requires the GPO to disclose to members at least annually (and the Secretary of HHS upon request) the amount received from vendors. In order for a GPO to be eligible for protection under the safe harbor, its members must not be owned by the GPO or commonly owned by the same parent company as the GPO.

Though the proposed arrangement does not completely satisfy all of the elements of the GPO safe harbor because of the common ownership of the GPO with some of its proposed members, the OIG found sufficient

protections to distinguish it from riskier fact patterns deemed illegal in prior guidance . The OIG concluded that the proposed arrangement posed a sufficiently low risk of fraud and abuse for the following reasons:

1. The GPO was an existing entity already serving a large number of unrelated members under an arrangement that fully complies with the GPO safe harbor.
2. The majority of membership would still consist of unrelated entities, with the new, commonly owned members representing only 35 percent of membership and approximately 20 percent of sales volume. All members would be subject to the same terms, minimizing the risk that administrative fees would be inducements for referrals from the commonly owned entities.
3. The parent company is a public company and all participants in the arrangement are separate legal entities, many of which have indirect ownership relationships with the parent company. The OIG distinguished this corporate structure from scenarios in which a single corporate entity has wholly owned subsidiaries that essentially operate as one company.

Take-Aways for GPO Arrangements

Advisory Opinion 18-07 is consistent with the trend of recent advisory opinions permitting an expansion of GPOs beyond the strict confines of the GPO safe harbor. For example, the OIG approved arrangements involving GPOs that did not fully satisfy the GPO safe harbor in Advisory Opinions 12-01 and 16-06. *(See "OIG Okays Purchasing Structure Outside of Strict Compliance with Discount and GPO Safe Harbors" and "OIG Approves Wholly Owned Group Purchasing Organization.")*

Interestingly, the OIG does not mention the discount safe harbor anywhere in Advisory Opinion 18-07. In its prior advisory opinions dealing with GPOs, the OIG recognized that the discount safe harbor was potentially applicable to protect administrative fees that might not otherwise be protected by the GPO safe harbor. Here, there is no reference to the discount exception or safe harbor, or to proper reporting on cost reports. It is unclear whether the OIG's silence on the discount safe harbor indicates its intentional suggestion of a change in approach relative to the discount safe harbor in connection with arrangements that do not fully satisfy the GPO safe harbor. Perhaps the omission simply reflects the fact that the subject GPO certified that it did not share administrative fees except for three arrangements on which the OIG specifically stated it was not offering an opinion. Without further clarification from the OIG, it seems prudent for cost report buyers to report as discounts any GPO fees that are not fully protected by the GPO safe harbor.