

PUBLICATION

Yet Again, OIG Approves Medigap Policy Contracts with Preferred Hospital Network in Advisory Opinion 16-13 [Ober|Kaler]

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On March 11, 2016, the U.S. Department of Health & Human Service, Office of the Inspector General (OIG) issued an advisory opinion approving the use of a preferred hospital network as part of Medicare Supplemental Health Insurance (Medigap) policies, whereby two insurance companies would indirectly contract with hospitals for discounts on Medicare inpatient deductibles for their policyholders and, in turn, provide a premium credit of \$100 to policyholders for using a network hospital for an inpatient stay (Proposed Plan).

In [Advisory Opinion 16-03 \[PDF\]](#), the OIG determined that the Proposed Plan would not constitute grounds for the imposition of sanctions under the civil monetary penalty prohibition against inducements to beneficiaries (CMP) or the anti-kickback statute (AKS). This opinion is yet another in a long line of favorable advisory opinion approving Medigap policy preferred hospital networks.

The requestors are two licensed insurers owned by the same corporate parent. They plan to start offering Medigap policies in several states and proposed to participate in an arrangement with a preferred hospital organization (PHO). The PHO has contracts with hospitals nationwide (Network Hospitals) and the Network Hospitals would give discounts of up to 100 percent on Medicare inpatient deductibles incurred by the requestors' Medigap plan policyholders, which would otherwise be covered by the requestors. The discounts apply only to Medicare Part A inpatient hospital deductibles. The Hospital Networks would not provide any other benefit to the requestors or their policyholders. Whenever the requestors receive a discount from a Network Hospital, they would pay the PHO a fee for administrative services. And, if a policyholder were to be admitted to a hospital other than a Network Hospital, the requestors still would pay the full Medicare Part A hospital deductible as provided under the Medigap plan. The Hospital Network would remain open to all qualified, accredited, and Medicare-certified hospitals. Finally, the physicians and surgeons at Network Hospitals would not receive any remuneration in return for referring patients to a Network Hospital.

Under the Proposed Plan, the requestors would return a portion of the savings resulting from the discounts directly to any policyholder who has an inpatient stay at a Network Hospital, in the form of a \$100 premium credit. Policyholders would be informed in advance of the Proposed Plan and the premium credit, and they also would be told that use of a non-Network Hospital would not affect their liability for costs under the covered plan, or result in any other penalty.

The savings realized by the requestors would be reflected in their annual experience exhibits filed with various state insurance departments that regulate premium rates, and thus would be taken into account when states review and approve rates.

The OIG analyzed the Proposed Plan under the AKS and the beneficiary inducement CMP. With respect to the AKS, the OIG determined that the Proposed Plan would not be protected by two potentially applicable safe harbors. First, the safe harbor for waivers of beneficiary coinsurance and deductible amounts specifically excludes waivers when they are part of an agreement with insurers, such as the case with the requestors. Similarly, the safe harbor for reduced premium amounts offered by health plans requires such reductions for *all* enrollees, whereas the Proposed Plan offers the premium reduction *only* for policyholders who choose

Network Hospitals. Still, even absent a safe harbor protection, the OIG concluded that in combination with Medigap coverage, the discounts offered on inpatient deductibles by Network Hospitals, and premium credits offered by Requestors to policyholders, presents a low risk of fraud or abuse under the AKS for several reasons:

1. The discounts and premium credits would not affect per-service Medicare payments because Part A payments for inpatient services are fixed and unaffected by beneficiary cost-sharing.
2. The Proposed Plan is unlikely to increase utilization because it is effectively invisible to policyholders and only applies to the individual's cost-sharing obligations that supplemental insurance otherwise would cover.
3. The Proposed Plan would not unfairly impact competition among hospitals because any qualified hospital can join the contracting PHO's network.
4. The Proposed Plan would not affect professional medical judgment because policyholders' physicians and surgeons receive no remuneration.
5. The Proposed Plan is transparent and policyholders may choose any hospital without incurring additional expenses.

Meanwhile, under the beneficiary inducement CMP, the premium credit would implicate the provision because it could induce the policyholders to choose a particular provider from a broader group of eligible providers. There is an exception to the definition of a prohibited remuneration, however, for differentials in coinsurance and deductible amounts as part of a benefit plan design, where the differentials are properly disclosed to affected parties. This includes cost-sharing plans that differentiate between in-network and out-of-network providers. Although the premium credit is not technically a differential in coinsurance or deductible amounts, it would have substantially the same purpose and effect as such a differential. Even so, the OIG concluded that the premium credit would present a sufficiently low risk of fraud or abuse under the prohibition on inducements to beneficiaries.

Further, the OIG noted that the Proposed Plan has the potential to lower Medigap costs for the requestors' policyholders who choose Network Hospitals, as well as the potential to lower costs for all policyholders because the savings realized by the requestors is reported to state insurance rate-setting regulators. In short, given the low risk of fraud and abuse and the potential for savings for beneficiaries, the OIG determined it would not impose administrative sanctions on the requestors under the AKS or the beneficiary inducement CMP in connection with the Proposed Plan.