

PUBLICATION

OIG Again Approves Medigap Insurer's Contract with Preferred Hospital Network [Ober|Kaler]

2014: Issue 25

On October 21, 2014, the Department of Health and Human Services, Office of Inspector General (OIG) issued Advisory Opinion 14-10, approving a Medigap insurer's proposed contract with a preferred hospital network. Similar to previous issuances, such as OIG Advisory Opinions 14-02, 14-04, and 14-07, the OIG concluded in Advisory Opinion 14-10 that a Medigap insurer's proposal to indirectly contract with hospitals for discounts on Medicare inpatient deductibles for its policyholders posed a sufficiently low risk of fraud or abuse under both the antikickback statute and the civil monetary penalties law (CMP) prohibiting inducements to beneficiaries.

Overview of Facts

The advisory opinion requester, a licensed Medigap insurer (Requester), covers 100 percent of its Medigap policyholders' (Policyholders) Part A inpatient hospital deductibles. To reduce its Part A inpatient hospital deductible costs, the Requester sought to indirectly contract with hospitals (Network Hospitals) via a preferred hospital organization (PPO). The PPO's hospital network would be open to any accredited, Medicare certified hospital that (1) meets the requirements of applicable state laws and (2) contractually agrees to discount all or a portion of the Part A deductible for the Requester's Policyholders.

Specifically, the Network Hospitals would agree to provide discounts of up to 100 percent on Medicare Part A inpatient deductibles incurred by the Requestor's Policyholders. Savings realized by the Requester would be shared with Policyholders that had an inpatient stay at a Network Hospital, in the form of a \$100 premium credit towards the Policyholder's next renewal period.

The proposed arrangement between Requester, the PPO, and Network Hospitals would not impact the liability of any of the Requester's Policyholders. If a Policyholder was admitted to a hospital other than a Network Hospital, the Requester would still pay the full Part A hospital deductible, as provided under the terms of the Medigap plan. The Requester certified that all Policyholders would be informed of its proposed arrangement with the PPO and Network Hospitals.

Antikickback Statute

While acknowledging the Requester's proposed arrangement would not qualify for protection under the antikickback statute safe harbor for waivers of beneficiary coinsurance and deductible amounts or the safe harbor for reduced premium amounts offered by health plans, the OIG nonetheless concluded that the discounts offered on inpatient deductibles by the Network Hospitals and the premium credits offered by the Requester to its Policyholders posed a "sufficiently low risk of fraud or abuse" under the antikickback statute.

In doing so, the OIG highlighted the following factors: (1) neither the discounts nor the premium credits would increase or affect per-service payments because Medicare Part A payments for inpatient services are generally fixed and are unaffected by beneficiary cost sharing; (2) the arrangement would be unlikely to increase utilization because the discounts would be invisible to Policyholders and the discounts apply to

inpatient services only; (3) membership in the PPO's hospital network would be open to any accredited, Medicare-certified hospital that meets the requirements of applicable state laws, and consequently, should not unfairly affect competition among hospitals; (4) the arrangement would be unlikely to impact medical judgment because the Policyholders' physicians and surgeons would receive no remuneration and the Policyholder would remain free to go to any hospital without incurring additional out-of-pocket expense; and (5) the arrangement would be transparent, in that the Requester would make clear to Policyholders that they have the freedom to choose any hospital without incurring additional liability or penalty.

Civil Monetary Penalties Law

The OIG first acknowledged that the Requester's proposed Policyholder premium credit implicates the CMP prohibition on inducements to beneficiaries, i.e., by inducing Policyholders to select a Network Hospital as their provider of choice. However, the OIG ultimately concluded that the premium credits presented a low risk of fraud or abuse under the CMP laws, finding the premium credits to be sufficiently analogous to benefit plan design differentials in coinsurance and deductible amounts, which the CMP law permits. S.S.A § 1128A(i)(6)(C).

Additionally, in its CMP fraud and abuse analysis, the OIG noted that the Requester's proposed arrangement had the potential to lower Medigap costs for Policyholders who select Network Hospitals, without increasing costs to those who do not, and that the arrangement may in fact lower costs for *all* Policyholders because savings realized from the proposed arrangement would be reported to state insurance rate-setting regulators.