PUBLICATION

OIG Approves Wholly Owned Group Purchasing Organization [Ober|Kaler]

2016: Issue 9 - Focus on HIPAA/Privacy

In Advisory Opinion 16-06 , the Office of Inspector General (OIG) approved a proposal whereby the ownership of a group purchasing organization (GPO) would be restructured so that the GPO will be wholly owned by the same corporate parent as some of the GPO's health care provider members.

The OIG analyzed three streams of remuneration under the anti-kickback statute: (1) the discounts the GPO negotiates from vendors on behalf of members, (2) the GPO's distribution of administrative fees to members; and (3) the administrative fees that the GPO collects from vendors. The OIG concluded that the first two streams of remuneration are potentially protected by the anti-kickback statute's discount exception and safe harbor. For the third stream of revenue, the OIG found that the definition of *GPO* under the GPO exception and safe harbor was not satisfied. However, the OIG would not impose administrative sanctions in this particular situation because it did not find the deviation from the safe harbor created an increased risk to federal health care programs.

The OIG emphasized that the GPO was the purchasing agent for approximately 84,000 members, but less than 1 percent of the total GPO members were owned or controlled by the corporate parent. Interestingly, the OIG did not consider what percentage of the purchasing volume through the GPO was by members who were owned or controlled by the corporate parent. The OIG also emphasized that all of the GPO members (whether owned or controlled by the corporate parent or not) would be treated similarly under the contracts negotiated by the GPO with vendors. Thus, the OIG acknowledged that there is a material difference between a GPO that exists for the primary benefit of a corporate parent's subsidiary health care providers, and, in this case, a GPO that benefits a large number of health care providers.

The Arrangement

The requestor was a GPO that was originally owned in equal shares by two parents, a nonprofit health system and another corporate entity that was owned by approximately 120 health care providers. Starting in July 2015, there were a series of transactions that resulted in the GPO being owned 95 percent by the nonprofit health system and 5 percent by an unrelated holding company. The requestor sought approval from the OIG for a final transaction that would result in the non-profit health care system owning 100 percent of the GPO.

The OIG noted that the nonprofit health system either owned or operated approximately 800 health care providers, which were members of the GPO. The GPO itself, however, has over 84,000 members nationwide.

The requestor made a number of certifications in connection with its advisory opinion request. The requestor certified that it would continue to serve the same markets with similar or improved results after the final transaction. The GPO would continue to negotiate with vendors on products and pricing and collect administrative fees on sales from vendors to members. Like other GPOs, the requestor would continue to use written agreements with each of its members, and these agreements would continue to specify the administrative fees that the GPO would collect from the vendors. Importantly, the requestor certified that all members of the GPO, including the 800 owned or controlled by the health system, would be subject to the same GPO terms and conditions. The requestor also certified that it would disclose to each member annually the amount of administrative fees collected from each vendor on behalf of that member. These reports would also be made available to the Secretary of Health and Human Services upon request. The GPO would continue to maintain member-specific records regarding the amount of shareback (the portion of any administrative fee returned to the members) and the price reductions obtained by the GPO. Lastly, the requestor certified that it currently provided, and would continue to provide, each member with the information necessary to allow the members to comply with the discount safe harbor to the anti-kickback statute.

OIG Analysis

The OIG began its analysis by pointing out three streams of remuneration at issue: (1) the discounts the GPO negotiates from vendors on behalf of members, (2) the GPO's distribution to members of administrative fees; and (3) the administrative fees that the GPO collects from vendors.

With regard to the first two streams of remuneration, the OIG noted that the discount exception and safe harbor would potentially be available. The OIG noted that nothing about the proposed arrangement would change its eligibility for the discount exception and safe harbor.

With regard to the third stream of revenue, however, the OIG observed that the GPO exception and safe harbor would no longer be available. The definition of *GPO* specifically excludes entities that serve as a purchasing agent for entities that are wholly owned by the purchasing agent or are subsidiaries of a parent that wholly owns the purchasing agent. The OIG then went into the history of the GPO safe harbor. In the Preamble to the 1991 Final Rule implementing, among others, the GPO safe harbor, the OIG had explained that the GPO safe harbor was not designed to protect vendor payments made to a nursing home chain on behalf of its subsidiary nursing homes. The OIG further explained that the definition of *GPO* in the GPO safe harbor intentionally prohibited this type of arrangement and that this definition matched the intent of Congress when creating the GPO exception.

In the situation presented by Advisory Opinion 16-06, the OIG distinguished the requestor from the nursing home scenario in the 1991 Final Rule. The OIG noted that the requestor would own or operate less than 1 percent of the total number of members of the GPO, instead of all of the members. The OIG also stressed that the requestor had certified that all of its members, regardless of ownership, would be subject to the same GPO terms and conditions and that the members owned and controlled by the corporate parent would not receive more or less favorable discounts or shareback payments than the other members. In light of these factors, the OIG concluded that the change in ownership did not increase the risk to federal health care programs and that the proposed arrangement presented “an acceptably low risk of fraud and abuse….”

Ober|Kaler's Comments

The OIG's conclusion that the proposed transaction would not increase the risk of fraud and abuse seems logical and appropriate. What is interesting is what the OIG did and did not rely on in reaching this conclusion. The OIG seemed to rely heavily on the fact that members that are owned or controlled by the corporate parent of the GPO represented less than 1 percent of the GPO's 80,000 members nationwide. The OIG did not mention what percentage of the GPO's purchasing volume is represented by members that are owned or controlled by the corporate parent of the GPO. The OIG also seemed to rely heavily on the fact that the same terms and conditions applied to purchases by members that are owned or controlled by the corporate parent of the GPO. In other words, the GPO was not being used to negotiate “sweetheart” deals for members that are owned or controlled by the corporate parent of the GPO.

Finally, it is interesting that the OIG did not discuss how GPO fees earned based on purchases by members that are owned or controlled by the corporate parent of the GPO should be treated for cost-reporting purposes.

In prior advisory opinions dealing with GPOs, the OIG seemed to stress the importance of treating such GPO fees as discounts.

Despite the OIG's relatively short, eight-page analysis, GPO arrangements that stray from the established discount and GPO safe harbors require careful analysis of the payments and discounts associated with the GPO, its members, and its vendors. When a GPO departs from the established safe harbor, these payments and discounts should be reviewed by experienced fraud and abuse counsel.