

PUBLICATION

IG Advisory Opinions Provide Some Helpful Guidance [Ober|Kaler]

2013: Issue 15 - Focus on Fraud and Abuse

In spite of a slow start, the OIG has issued a number of interesting advisory opinions to date in 2013. Here are a few of the highlights. The OIG reiterated its long-standing concern about arrangements which "carve out" federal health care program business in rejecting a lab arrangement in Advisory Opinion 13-03.

In approving a tiered rebate program in Advisory Opinion 13-07, the OIG contrasted the tiered rebates to bundled discounts and reward programs. The OIG approved a "low-risk" podiatric medicine arrangement involving common ownership between Medicare-enrolled and non-enrolled entities in Advisory Opinion 13-02. The OIG also approved two Medigap network discount arrangements in Advisory Opinions 13-01 and 13-06. Below are short descriptions of each of the advisory opinions issued thus far in 2013.

Advisory Opinion 13-01: Medigap Network Discount

In [Advisory Opinion 13-01 \[PDF\]](#), the OIG approved the use of a hospital network as part of a Medicare Supplemental Health Insurance (Medigap) policy. The sponsor of the Medigap plan would indirectly contract with hospitals through preferred provider organizations (PPOs) for discounts on otherwise applicable Medicare inpatient deductibles for Medigap policyholders. The discounts could be as high as 100 percent of the Medicare inpatient deductible. The Medigap plan would pay the PPO an administrative service fee in connection with the discounts.

The OIG approved the Medigap discount arrangement as presenting a low risk of fraud and abuse for the following reasons:

1. The discounts would not increase or affect per-service Medicare payments.
2. The discounts should not increase utilization, because they are effectively invisible to patients.
3. The arrangement should not unfairly affect competition because the network would be open to any accredited, Medicare-certified hospital.
4. The arrangement would not likely affect professional medical judgment because physicians would receive no remuneration and be free to go to any hospital.
5. The arrangement would operate transparently as policyholders would have freedom to choose any hospital.
6. Because the savings would be reported to state insurance rate setting regulators, the arrangement could potentially lower costs for all policyholders.

Advisory Opinion 13-02: Podiatric Medicine Arrangement

[Advisory Opinion 13-02 \[PDF\]](#) involves the establishment of a limited liability company by the owners of a podiatric medicine practice to enter into arrangements with manufacturers to provide industrial orthotics for use by the manufacturers' employees. The industrial orthotics would not be billed to or paid by federal health care programs. The manufacturers would pay for the orthotics for their employees.

Initially, the OIG expressed concern about the arrangement because the podiatric medicine practice could provide services paid by federal health care programs. However, the OIG distinguished the arrangement from "swapping" arrangements. In approving the arrangement, the OIG cited several positive attributes that reduced the risk of fraud or abuse. The price of the industrial orthotics is fair market value and would not vary based on the volume or value of referrals. The LLC employees would not refer manufacturers' employees to the podiatric medicine practice and compensation paid to the LLC employees and the practice employees would be fair market value and would not vary based on the volume or value of referrals.

Advisory Opinion 13-03: Lab Carve-out Rejected

[Advisory Opinion 13-03 \[PDF\]](#) involves an arrangement whereby a clinical laboratory company would have provided various laboratory services to physician practices for patients not covered by federal health care programs.

In rejecting the arrangement, the OIG reiterated its long-standing concern about arrangements that carve out federal health care program business. The OIG concluded that the lab would be providing remuneration to the physician practice in the form of the opportunity to expand into a financially profitable lab business with little or no risk. While the practice retained freedom of choice where to send federal health care program business, the OIG expressed concern that the proposed arrangement might inappropriately influence referrals of the federal health care program business.

Advisory Opinion 13-04: Ambulance Transport Arrangement

In [Advisory Opinion 13-04 \[PDF\]](#), the OIG approved a non-emergency ambulance transportation arrangement involving a health district established pursuant to state law. The OIG found the arrangement posed a minimal risk of fraud and abuse.

Advisory Opinion 13-05: Ambulance Reimbursement for Emergency Dispatch Services

In [Advisory Opinion 13-05 \[PDF\]](#), the OIG approved an arrangement whereby a private ambulance company with an exclusive contract to provide emergency medical services in a municipality reimburses the municipality for a portion of the costs of providing emergency dispatch services. The OIG found the arrangement posed a minimal risk of fraud and abuse.

Advisory Opinion 13-06: Medigap Network Discounts

In [Advisory Opinion 13-06 \[PDF\]](#), the OIG permitted a health plan that offers Medigap policies to use a "preferred hospital" network to obtain discounts on otherwise applicable Medicare inpatient deductibles and provide a premium credit for policyholders who select a network hospital for an inpatient stay. The health plan would obtain discounts from hospitals as high as 100 percent of the Medicare inpatient deductible through an arrangement with a network management organization (NMO).

The arrangement here is similar to that in [Advisory Opinion 13-1](#), except that it adds the premium credit for policyholders. In approving [Advisory Opinion 13-06](#), the OIG applied the same factors as it did in [Advisory Opinion 13-1](#) with only minor variation to account for the premium credit. The OIG briefly considered the premium credit under the prohibition against inducements to beneficiaries and concluded that it is sufficiently similar to the exception for differentials in coinsurance and deductibles as part of benefit design.

Advisory Opinion 13-07: Tiered Discounts

The OIG approved a tiered rebate program based upon purchases of both federally reimbursable and non-federally reimbursable products in [Advisory Opinion 13-07 \[PDF\]](#). The rebate would be based on total purchases of ophthalmologic products from the manufacturer. Depending on the level of total purchases in a calendar year, the rebate would increase from 5 to 10 to 20 percent.

In approving a tiered rebate program, the OIG contrasted it to bundled discounts and reward programs. The OIG noted that the tiered rebate would not be contingent on the purchase of another specific product because it would be based on total purchases. The OIG found that the tiered rebate program met the requirements of a rebate in that the terms were fixed and disclosed in writing to the buyer at the time of the initial purchase to which the discount applied. The OIG also discussed the sellers' obligation under the discount safe harbor to provide appropriate notice.

Advisory Opinion 13-08: Nonresident-only EMS Billing Not "Substantially in Excess"

In [Advisory Opinion 13-08 \[PDF\]](#), the OIG analyzed an EMS billing arrangement under the OIG's permissive exclusion authority for submitting bills "substantially in excess" of usual charges. Under the EMS billing arrangement, a fire protection district billed only nonresidents (and their insurance) for EMS services. Residents (and their insurance) were not billed for EMS services, with the costs covered through tax revenues. The OIG found this arrangement did not warrant permissive exclusion as it was reasonable and fell within the district's discretion.

Ober|Kaler's Comments

In reviewing advisory opinions, it is important to remember that they technically only protect the individuals who requested them. While advisory opinions can provide helpful insight into the government's interpretation of the fraud and abuse laws, the value of advisory opinions may be limited. The OIG frequently appears constrained in approving arrangements through the advisory opinion process out of a concern that fact-specific analyses will be improperly expanded.