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OIG Approves (Yet) Another Medigap/PHO Arrangement in Advisory Opinion 17-04

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With Advisory Opinion 17-04, issued August 24, 2017, the U.S. Department of Health and Human Services, Office of Inspector General (OIG) adds to the ever-growing number of favorable advisory opinions regarding an agreement between a Medicare Supplemental Health Insurance (Medigap) insurer and a preferred hospital organization (PHO). The OIG has issued several advisory opinions on virtually the same proposed arrangement between Medigap insurers and PHOs, which the Baker Ober Health Law Group most recently covered in Advisory Opinions 16-11, 16-05 and 16-04.

Under the proposed arrangement, the Medigap insurer requesting the advisory opinion would contract with a PHO to receive discounts of up to 100 percent on Medicare Part A inpatient hospital deductibles incurred by Medigap policyholders. No other cost-sharing amounts are eligible. Hospitals that are under contract with the PHO (Network Hospitals) would provide the discount on the Medicare Part A inpatient deductible to the Medigap insurer when Medigap policyholders have an inpatient stay at a Network Hospital. Additionally, the Medigap insurer would provide policyholders with a $100 premium credit when using a Network Hospital for their inpatient stay. The Medigap insurer would pay the PHO a fee for administrative services for every discount received by the Medigap insurer under this arrangement. The OIG determined that the proposed arrangement could potentially implicate both the anti-kickback statute and the civil monetary penalty against inducements to beneficiaries (CMP); however, the OIG concluded it would not impose any administrative sanctions.

Similar to several previous advisory opinions addressing such arrangements, the OIG found that the proposed arrangement did not qualify for safe harbor protection for waiver of cost-sharing amounts or for reduced payment premium amounts under the anti-kickback statute. Nonetheless, the OIG determined that the proposed arrangement presents a minimal risk of fraud and abuse for the following reasons:

1. Per-service Medicare payments remain the same;
2. Utilization is unlikely to increase because the cost-sharing would be covered by insurance, which makes the benefit effectively invisible to beneficiaries;
3. The PHO is open to any accredited, Medicare-certified hospitals that meet applicable state law requirements;
4. Medical judgment is unaffected because no remuneration is provided to physicians; and
5. Medigap policyholders retain the freedom to choose any hospital and do not incur a penalty for choosing a non-Network Hospital.

With regard to the CMP for beneficiary inducement, the OIG concluded that an exception allowing differentials in deductibles and cost-sharing as part of a benefit plan design, while not directly applicable here, would apply sufficiently by analogy to reduce the risk that beneficiaries would be unduly influenced by the described benefit. Further, the OIG determined that the arrangement, which would be reported to state insurance rate-setting agencies, could lead to savings that would reduce costs for all plan members, regardless of whether they had qualifying hospital stays.