

OIG Issues Advisory Opinion No. 12-22 Providing Additional Guidance on Performance Payments in Co-Management Arrangements

On December 31, 2012, the Department of Health and Human Services, Office of Inspector General ("OIG") issued favorable Advisory Opinion No. 12-22 (the "Advisory Opinion") regarding a cardiology co-management agreement ("Co-Management Agreement") between a hospital ("Hospital") and a private cardiology group practice ("Group"). Under the Co-Management Agreement, the Group is paid a performance bonus in return for implementing quality improvement and cost-savings measures at the Hospital's cardiac catheterization laboratories (the "Proposed Arrangement"). The OIG advised that it would not impose sanctions in connection with the Proposed Arrangement even though the Proposed Arrangement could: (i) constitute an improper payment under the Civil Monetary Penalty law ("CMP") by inducing the reduction or limitation of services to Medicare beneficiaries, and (ii) potentially generate prohibited remuneration under the Anti-Kickback Statute if the requisite intent to induce or reward referrals were present.

I. Background

Hospital is a large, rural acute care hospital located in a medically underserved area that operates as provider-based departments four cardiac catheterization laboratories ("Labs"). The Labs are the only such laboratories within a fifty-mile radius of Hospital. Hospital bills

and collects all non-professional fees generated for services provided in the Labs and provides space, certain non-physician staff, equipment and supplies for the Labs.

The Group consists of approximately eighteen full-time physicians, including general cardiologists, interventional cardiologists that perform procedures in the Labs, and electrophysiologists. The Group bills the appropriate payor for the professional services rendered by its physicians. Although the Co-Management Agreement is not exclusive, the Group is the only cardiology group on Hospital's medical staff and the only physician group in the town that provides cardiac catheterization services.

Under the Co-Management Agreement, the Group provides management and medical direction services for the Labs, oversight of lab operations, strategic planning, service on committees and equipment recommendations. In exchange, the Group receives a co-management fee composed of: 1) a guaranteed, fixed fee ("Fixed Fee"); and 2) an annual performance-based payment that is capped at the fixed fee amount ("Performance Fee"). The Performance Fee components include Hospital employee satisfaction (5%), patient satisfaction in the Labs (5%), quality (30%), and cost-savings

(60%). The components are comprised of various financial, purchasing, employee satisfaction, patient satisfaction, and quality measurement data systems, as well as national cardiology quality measures.

The Group's performance with regard to the various measures is monitored by Hospital committees, a Hospital internal audit department, and an independent accounting firm to review the Hospital's internal audit department's findings. The Hospital Board of Directors' Compliance and Audit Committee reviews the independent accounting firm's findings and approves payment of any amount under the Performance Fee. The Group distributes dividends derived from the fees to shareholders in proportion to their ownership in the Group, regardless of participation in the Co-Management Agreement. The Hospital represented to the OIG that the Fixed Fee and Performance Fee are consistent with fair market value and are commercially reasonable.

II. CMP Analysis

In its analysis, the OIG indicated that the cost-savings component of the Performance Fee implicates the CMP because measures related to standardization and limitation of devices and supplies could induce physicians to reduce or limit services. However, the OIG

determined that it would not impose sanctions under the CMP because the Proposed Arrangement contains features that provide sufficient safeguards to ensure that cost savings are not achieved by reducing or limiting care. Such safeguards include:

- i) Multiple monitoring mechanisms, including internal and external auditors, to ensure savings are not achieved by reducing or limiting patient care;
- ii) Benchmarks that provide Group physicians access to the most cost-effective and clinically appropriate items and supplies without restricting the availability of other devices or supplies;
- iii) The Performance Fee payment is based on aggregate performance, not meeting standards in the case of individual patients;
- iv) The cost savings financial incentive is limited in amount (the Performance Fee cap) and duration (three years); and
- v) Payment of the Performance Fee is conditioned upon the Group not: (a) stinting on care; (b) increasing referrals; (c) “cherry picking” healthy patients or those with favorable insurance; or (d) accelerating discharges.

III. Anti-Kickback Statute Analysis

With respect to the Anti-Kickback Statute, the OIG noted that the Proposed Arrangement did not fit within the personal services and management contracts safe harbor because aggregate payments to Group were not set in advance. As a result, the Proposed Arrangement could disguise remuneration intended to reward or induce Group referrals, if the required intent to induce referrals was present, but the OIG noted that it would not impose sanctions because:

- i) Hospital certified that the compensation is fair market value;
- ii) The Group provides substantial services, reducing the risk that payment is for referrals;
- iii) Compensation does not vary with patients treated or referrals;
- iv) Hospital operates the only cardiac catheterization labs within a fifty-mile radius and Group only provides cardiac catheterization services at the Labs, limiting the risk that the risk that the Proposed Arrangement is to induce referrals;
- v) The specificity of the measures helps ensure their purpose is

to improve quality, especially over the status quo; and

- vi) The Co-Management Agreement is limited to a three year term.

IV. Conclusion

Based on the facts and circumstances, the OIG indicated it would not impose sanctions under the Proposed Arrangement even though it could improperly induce the reduction or limitation of services under the CMP and generate prohibited remuneration under the Anti-Kickback Statute if the requisite intent were present. This Advisory Opinion provides a useful roadmap for hospitals and physicians interested in structuring a compliant co-management arrangement, even though the analysis is only binding on the requesting party. For more information about structuring co-management arrangements, or the application of the Civil Monetary Penalty law or the federal Anti-Kickback Statute, please contact Jim Daniel, Mike Newby or Matt Connors at (804) 967-9604, or by email at jdaniel@hdjn.com, mnewby@hdjn.com, or mconnors@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm’s website at www.hdjn.com.

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