ALIGNING PHYSICIAN-HOSPITAL INTERESTS: CO-MANAGEMENT MAY BE THE OPTION

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The Office of Inspector General for the US Department of Health & Human Services (OIG) issued Advisory Opinion 12-22 (AO 12-22 or Opinion) on December 31, 2012. AO 12-22 provides guidance to hospitals and physicians who are thinking of entering co-management agreements to align their interests. In this opinion, the OIG determined the proposed arrangement would not warrant sanctions under the federal civil monetary penalty law (CMP) or the Anti-Kickback Statute.

Under the co-management arrangement in question, a cardiology group (Group) would provide management and medical direction services for the cardiac catheterization laboratories owned by the hospital and receive a management fee composed of: (1) a guaranteed, annual fixed payment; and (2) an annual performance-based payment up to an established cap. The hospital would pay both the fixed fee and the performance fee to the Group on a quarterly basis. To receive the performance fee, the Group would need to achieve specified metrics across predetermined measures such as enhanced patient satisfaction, quality improvement, and cost containment. Upon payment, the Group would then distribute dividends derived from the co-management fees based on the shareholders pro rata ownership in the Group rather than on any physician’s participation in the Co-Management Agreement.

The OIG expressed concerns that management fees allegedly intended to encourage quality improvements and cost savings may be misused by unethical providers to disguise kickbacks or to induce reductions in care. Despite these concerns, the OIG concluded the proposed arrangement would be compliant with both the CMP and Anti-Kickback Statute. Thus, the OIG’s analysis serves as a potential road map for healthcare providers who are looking to enter into similar arrangements.
In concluding that the arrangement complies with the CMP, the OIG cited the following factors:

1. The hospital certified that the arrangement does not negatively impact patient care and that it has a program in place to monitor the performance of the Group;
2. The risk of the Group providing inappropriate medical care is low;
3. Financial incentives linked to cost savings are limited in duration and amount; and
4. Incentives are not conditioned on any of the following:
   a. Stinting on care provided to hospital patients;
   b. Increasing referrals to the hospital;
   c. Cherry picking patients relative to health or insurance plans; or
   d. Accelerating patient discharges.

In concluding that the arrangement complies with the Anti-Kickback Statute, the OIG cited the following factors:

1. The compensation paid will be fair market value as determined by a qualified valuation firm, and the Group will provide substantial services, minimizing the risk of payments for referrals.
2. The compensation to the Group will not vary with the number of patients or referrals, and all payments to the Group would be distributed pro-rata among the Group’s shareholders.
3. The Group already furnishes all its cardiac catheterizations at the hospital’s labs, minimizing the risk that the hospital is offering the Group the arrangement to induce referrals.
4. The Co-Management Agreement is in writing with a limited three-year term.
5. The nature of the measures and the baseline achievement level requiring improvement from the hospital’s status quo ensures that the arrangement’s purpose is to improve quality rather than reward referrals.

As is always the case, the OIG notes that AO 12-22 (or any other advisory opinion) cannot be relied upon by anyone other than the requestor or the parties to the arrangement. Despite this limitation, providers contemplating co-management arrangements could use the OIG’s analysis in AO 12-22 as a guide for compliance when structuring their own deals.

If you have any questions regarding this newsletter, please contact the author(s) at Stuart.Miller@strasburger.com. To learn more about Strasburger’s Health Group, click here.

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