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OIG Addresses Free Third Party Payor Pre-Authorization Services for Physicians and Patients in Advisory Opinion 10-13

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On August 24, 2010, The U.S. Department of Health and Human Services Office of the Inspector General ("OIG") released its Advisory Opinion 10-13. The opinion addresses a hospital's proposal to provide free third party payor pre-authorization services to patients and physicians for diagnostic imaging services provided at the hospital.

The arrangement discussed in the opinion involves a hospital that provides outpatient diagnostic imaging services. The hospital proposed that it would provide free pre-authorization services for all patients referred to it for imaging services. When a patient's imaging procedure requires pre-authorization, the hospital's Pre-Access Department would contact the patient's insurer and provide it with information necessary to obtain pre-authorization. The pre-authorization services would be at no charge and made available on an equal basis to all patients and referring physicians using the hospital without regard to any physician's overall volume or value of expected or past referrals to the hospital.

In the Opinion, the OIG discusses its long-standing concern over the provision of free or below-market goods or services to actual or potential referral sources and explains that such arrangements are suspect and may violate the anti-kickback statute, depending on the circumstances. In discussing the specific facts of the arrangement, the OIG advises that obtaining pre-authorization from insurers is an administrative service with potential independent value to physicians; however, whether that service confers a benefit upon a particular referring physician depends on the facts and circumstances. Where a referring physician's contract with an insurer specifically allocates responsibility for obtaining pre-authorization to the physician, an imaging provider's free pre-authorization service would relieve that physician of having to perform administrative services on which he or she would otherwise have to expend his or her own resources.

The OIG opines that when a party in a position to benefit from referrals provides free administrative services to an existing or potential referral source, there is a risk that at least one purpose of providing the services is to influence referrals.

However, the OIG eventually concludes that it believes the proposed arrangement presents a low level of such risk. It concludes that while the proposed arrangement could potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce or reward referrals of Federal health care program business were present, it would not impose administrative sanctions given the facts and issues discussed in the Opinion. The OIG's conclusion is based on the following four issues:

- While the proposed arrangement could result in some remuneration to physicians who have been expending administrative resources to obtain pre-authorizations for their patients, it would not target any particular referring physicians. In the majority of cases, given the multitude of insurance plans and plan requirements, the hospital is unlikely to know a physician's obligations with respect to an order for a particular patient and any relief of those obligations would occur by chance, not design.
- The proposed arrangement contains safeguards that lower the risk of fraud and abuse. No payments are made to physicians and there are no ancillary agreements with referring physicians that would otherwise reward referrals to the hospital. The hospital will make no assurances to physicians or patients that its pre-authorization service would result in pre-authorization being approved, and it will collect and provide to insurers only such documentation of medical necessity as it receives from referring physicians.
- The Pre-Access Department handling the pre-authorizations would operate transparently. Personnel would identify themselves to insurers as employees or representatives of the hospital, disclose to insurers the nature of the program, and would provide each physician with a copy of all the information it submits to insurers to obtain pre-authorization for that physician's patients. Pre-Access Department staff would have little opportunity to influence referrals because patients would have already selected the hospital.
- The hospital has a legitimate business interest in offering uniform pre-authorization services. Whereas insurers may place responsibility for pre-authorization on imaging providers, referring physicians, or patients, only the hospital's payments are at stake. The hospital's financial interest in ensuring that pre-authorization is diligently pursued provides a rationale for the proposed arrangement wholly distinct from a scheme to curry favor with referral sources.

When considering providing pre-authorization services, hospitals and other types of providers should take into account OIG guidance on these issues and the specific factors the OIG has used to evaluate these types of arrangements.

Additional Information

For more information on Advisory Opinion 10-13, the Anti-Kickback Statute, pre-authorization programs or other related issues, please contact a member of Benesch's Health Care Department:

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