



## New OIG Opinion Leaves Door Open to New Preferred Hospital Networks Without Violating Kickback Statutes

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### A False Claims Bulletin

The Office of Inspector General (OIG) of the U.S. Department of Health & Human Services (HHS) released an advisory opinion on June 27, 2013 in reference to the use of a “preferred hospital” network as part of certain Medicare Supplemental Health Insurance (“Medigap”) policies. Under these policies, a licensed offeror of Medigap policies and other health insurance products would indirectly contract with hospitals for discounts on the otherwise applicable Medicare inpatient deductibles for its policyholders (“Insurer”). The company would in turn provide a premium credit ranging from \$100 to \$150 to policyholders who use a network hospital for an inpatient stay. The question presented was whether that “Proposed Plan” violates the Section 1128A and B of the federal Anti-Kickback Statute.

Section 1128B(b) of the Social Security Act makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a federal health care program. Where remuneration is paid purposefully to induce or reward referrals of items or services payable by a federal health care program, the Anti-Kickback Statute is violated. By its terms, the statute ascribes criminal liability to parties on both sides of an impermissible “kickback” transaction. For purposes of the Anti-Kickback Statute, “remuneration” includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

The OIG stated in its advisory opinion the the Proposed Arrangement is a straightforward agreement by the Network Hospitals to discount the Medicare inpatient deductible for the Insurer’s policyholders, an amount for which the Insurer otherwise would be liable. The OIG stated that the law is clear that prohibited remuneration under the Anti-Kickback Statute may include waivers of Medicare cost sharing amounts. It went on to say that relief of a financial obligation may constitute a prohibited kickback.

However, after careful review of the proposed plan, OIG concluded that the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties. It came to that conclusion by explaining that the discounts and premium credits would not increase or affect per-service Medicare payments. Further, the Proposed Arrangement would be unlikely to increase utilization as it would not unfairly impact competition among hospitals. In addition, the Proposed Arrangement would be unlikely to affect professional medical judgment, because the policyholders’ physicians and surgeons would receive no remuneration, and the policyholder would remain free to go to any hospital without incurring any additional out-of-pocket expense. Finally, the OIG stated that the Proposed Arrangement has the potential to lower Medigap costs for the policyholders who select network hospitals, without increasing costs to those who do not.

Thus, based on the totality of the facts and circumstances, and given the sufficiently low risk of fraud or abuse and the potential for savings for beneficiaries, the OIG stated that they would not impose administrative sanctions under the Anti-Kickback Statute or the prohibition on inducements to beneficiaries in connection with the Proposed Arrangement.

# Authors

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