

OIG Provides Direction and CMS Seeks Direction Relating to Electronic Activities in the Health Care Delivery System

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SUMMARY

The OIG recently posted an Advisory Opinion which concluded that a hospital's proposal to provide free access to an electronic interface between the hospital and area physicians for laboratory and diagnostic services was not "remuneration" under the federal Anti-Kickback Statute. In addition, CMS has requested that hospitals, electronic health record vendors and other interested parties provide information to it relating to electronic reporting capability under the Hospital Inpatient Quality Reporting Program.

OIG Provides Advisory Opinion on Provision of Electronic Interface

On December 19, 2012, the Office Of Inspector General (OIG) posted Advisory Opinion 12-20 (<https://oig.hhs.gov/fraud/docs/advisoryopinions/2012/AdvOpn12-20.pdf>). This Advisory Opinion addressed a hospital's proposal to provide free access to an electronic interface to community physicians and physician practices that would permit these physicians and groups to transmit orders for laboratory and diagnostic services to be performed by that hospital and to receive results of those services. In addition to providing the free interface access, the hospital would provide (through a contractor) support services to maintain the interface which would include software updates. Any physician or physician group that participated in the proposed arrangement with the hospital would be responsible for each aspect of their own electronic health records (EHR) system, including hardware and connectivity, to communicate with the hospital through the interface. The hospital certified that the interface would serve no purpose other than to transmit orders and results, and that the interface would be freely available to any community physician or practice who requested access.

The OIG concluded that in the proposed arrangement the free access to the interface and the related support services would not constitute "remuneration" to the participating physicians under the federal Anti-Kickback Statute, and therefore the OIG would not impose administrative sanctions on the requester hospital. The OIG concluded that interface access was "integrally related to the [hospital's] services" such that "free access would have no independent value" to the physicians apart from the services provided by the hospital.

CMS Requests Information on Electronic Reporting Capability

On January 3, 2013, the Centers for Medicare & Medicaid Services (CMS) posted a request for information in the Federal Register (<http://www.gpo.gov/fdsys/pkg/FR-2013-01-03/pdf/2012-31582.pdf>). CMS is specifically requesting that hospitals, electronic health record vendors and other interested parties provide information to CMS relating to electronic reporting capability under the Hospital

Inpatient Quality Reporting (IQR) Program using the Quality Reporting Document Architecture (QRDA) Category I for hospitals beginning with patient discharges in 2014. CMS is requesting all information to be provided no later than the close of business on January 22, 2013.

In the request for information, CMS noted its interest in aligning clinical quality measurement and reporting among its quality reporting programs. CMS would like to reduce the burden upon hospitals and support quality care improvement. In particular, CMS wants to know whether hospitals will be able to switch primarily to EHR-based reporting of clinical quality data for many measures that are currently manually abstracted from charts and submitted to CMS for the IQR program. Certain questions posed by CMS are directed to hospitals and other interested parties, and other questions are directed to EHR vendors and other interested parties. For instance, CMS is requesting hospitals to inform CMS if the hospital is planning to adopt certified EHR technology, according to the 2014 Edition EHR certification criteria during or before 2014. With respect to EHR vendors, CMS is interested in identifying the top three operational challenges facing EHR vendors between 2013 and 2015. Hospitals, EHR vendors and other interested parties are encouraged to provide responses to CMS to facilitate CMS's understanding of the current state of EHR-based reporting capabilities and hospitals' abilities to use these capabilities.

EHR and EHR-related technologies are changing the health care delivery system. The OIG and CMS each have a vested interest in these changes. As hospitals, health care facilities,

physicians and health care entrepreneurs continue to expand the scope and use of EHR and other electronic and computer capabilities, new regulatory and compliance challenges and opportunities will become apparent and additional clarity may be required. The members of Saul Ewing's Health Practice Group can help you identify and address those challenges.

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