

OIG Approves Proposed Free Pre-Authorization Services Arrangement

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On May 6, 2010 the Office of Inspector General (OIG) posted Advisory Opinion 10-04, approving a program conducted by several imaging centers to provide free pre-authorization services to patients and referring physicians (henceforth referred to as the Pre-Authorization Arrangement). This approval was somewhat unexpected in light of the OIG's prior issuance of several advisory opinions and other guidance, articulating concerns regarding free items/services for referring physicians. Nonetheless, the OIG's position in Advisory Opinion 10-04 is likely to be received favorably by the significant number of imaging providers who have been trying to bridge the tension between advancing their business prospects in an increasingly competitive landscape, while simultaneously seeking to engage in conduct that abides by the Anti-kickback Statute (AKS).

The Pre-Authorization Arrangement involved several imaging centers implementing a program to obtain from insurers any required pre-authorization for diagnostic imaging services provided at the centers. Under the Pre-Authorization Arrangement, the imaging centers established a call center to receive calls from patients and referring physicians' offices to request pre-authorization services. The call center's services would be free of charge and made available on an equal basis, irrespective of the number or value of referrals from a referring physician.

In analyzing the proposed pre-authorization arrangement, the OIG recognized that when a party in a position to benefit from referrals (eg, imaging centers) provides free administrative services to an existing or potential referral source, there is a risk that the arrangement could influence referrals (a predicate element to an AKS violation). Due to a combination of factors relating to the structure of the program and the safeguards incorporated into the operational framework, the OIG concluded that the arrangement presented a relatively low level of risk, and thus would not provide a basis for administrative sanctions under the AKS. The reasons behind the OIG's decision to approve the Pre-Authorization Arrangement included:

1. The Pre-Authorization Arrangement's administrative services is made available to all patients and referring physicians on an equal basis, regardless of any referring physician's overall volume or value of expected or past referrals. The OIG noted

that the Pre-Authorization Arrangement did not target any particular referring physicians, in contrast to many arrangements in which physicians are in a position to benefit from a service provided by a recipient of their referrals. Further, given the multitude of insurance plans and plan requirements, the imaging centers were considered to be unaware of a particular physician's obligations with respect to an order for a particular patient. Under these circumstances, the OIG explained that when the imaging centers unintentionally relieve some physicians of their pre-authorization obligations, such relief occurs more by chance than by design.

2. The Pre-Authorization Arrangement does not include any payments to the referring physicians, nor does it otherwise reward the physicians' referrals. The OIG noted that the imaging centers would make no assurances to physicians or patients that the use of its call center would result in the pre-authorization being approved, and they would collect and provide from patients and referring physicians only medically necessary documentation to insurers.

3. The Pre-Authorization Arrangement's call center would operate transparently. That is, personnel would identify themselves to insurers as representatives of the imaging centers, disclose the nature of the Pre-Authorization Arrangement, and would provide each physician with a copy of all the information that it submits to the insurers to obtain the pre-authorization. The OIG believes the call center staff would have only limited opportunity to influence referrals based upon the presumption that patients have already selected their imaging center. The OIG distinguished the Pre-Authorization Arrangement from higher-risk arrangements (in which providers encourage referrals by furnishing referring physicians with staff who have a greater ability to influence referrals—eg, discharge planners, home care liaisons, etc).

4. The OIG notably recognized that the imaging centers have a legitimate business interest in offering uniform pre-authorization services in that the imaging centers' payments are based on pre-authorizations. The OIG pointed out that the imaging centers' financial interest to ensure the pre-authorizations are obtained appropriately represents a reasonable rationale, unlike arrangements designed to induce referrals.

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The OIG emphasized that the opinion does not imply that imaging centers (or other providers) are required to offer or provide free pre-authorization services to patients or referring physicians. Nor does Advisory Opinion 10-04 endorse all pre-authorization programs by imaging providers. Rather, the structure of the program and integration of safeguards permit-

ted the OIG to conclude that the Pre-Authorization Arrangement did not present the same AKS abuses that the OIG has identified in other arrangements involving potential benefit to referring physicians. Thus, imaging providers that currently provide such pre-authorization services to referral sources, or are considering such services, should have their arrangements reviewed to ensure that the program contains appropriate safeguards to diminish AKS risks.