

# OIG Rejects Gainsharing Arrangements Between Hospitals and Physicians

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On July 8, 1999, the Department of Health and Human Services, Office of Inspector General (“OIG”) released a Special Advisory Bulletin on “Gainsharing Arrangements and Civil Monetary Penalties for Hospital Payments to Physicians to Reduce or Limit Services to Beneficiaries.” According to the OIG, many gainsharing arrangements are prohibited by federal law and are subject to civil monetary penalties (“CMPs”) established at sections 1128A(b)(1) and (2) of the Social Security Act (“SSA”). The health care industry which had embraced many gainsharing mechanisms has reacted angrily to the OIG's Bulletin.

## **I. Gainsharing Arrangements**

“Gainsharing” broadly refers to a common practice whereby hospitals share a portion of cost-savings achieved by the institution with its physician staff in return for efforts by the physicians to reduce hospital clinical costs. A typical gainsharing arrangement is structured such that hospital physician staff receive a predetermined percentage of some identified balance of money.

For example, a hospital may wish to agree to pay its medical staff a percentage of certain DRG payments received from Medicare if the physicians help the hospital in achieving cost efficiency in connection with the delivery of these services. To encourage physicians to reduce medically unnecessary care or avoidable use of institutional services, the hospital agrees to share its savings with its medical staff. Typically, the gainsharing agreement specifically provides that medically necessary care cannot and will not be denied.

## **II. Federal Law Prohibition**

Although the OIG recognized that hospitals have “legitimate interest in enlisting physicians in their efforts to eliminate unnecessary costs,” it concluded in its Bulletin that sections 1128A(b)(1) and (2) of the SSA prohibit gainsharing arrangements involving treatment for *fee-for-service* Medicare or Medicaid patients. Under this provision, a hospital may not knowingly make a payment, directly or indirectly, to a physician as an inducement to reduce or limit services to Medicare or Medicaid beneficiaries under the physician’s direct care. Hospitals that make, or physicians that receive such payments may be found liable for CMPs of up to \$2,000 per patient covered by the payments where, in the OIG’s view, the hospital knows that payment may influence the physician to reduce or limit services to a patient. According to the OIG, there is no requirement that the payments actually lead to a reduction in medically necessary care. Neither is it relevant, under the OIG’s interpretation of the statute, whether the payments might restrict or limit medically necessary or medically unnecessary services.

On first impression, many in the health care industry interpreted the OIG opinion as prohibiting any physician incentive plan that conditions hospital payments to physicians based on savings attributable to reductions in hospital service costs in both fee-for-service plans as well as plans involving Medicare beneficiaries enrolled in risk-based managed care programs. Subsequent guidance from the OIG, however, clarified that hospital-physician incentive plans limited to Medicare or Medicaid beneficiaries enrolled in risk-based plans are subject to regulation under section sections 1876(i)(8), 1903(m)(2)(A)(x), or 1852(j)(4) of the Social Security Act, rather than sections 1128A(b)(1) and (2). Accordingly, if properly undertaken, gainsharing can take place lawfully for Medicare and Medicaid managed care patients.

The OIG has concluded, however, that the CMP prohibition in the fee-for-service context is broad and without statutory or regulatory exception. Significantly, OIG states that Congress did not grant the Secretary of the Department of Health and Human Services authority to approve some hospital-physician incentive plans, as it did in connection with to risk-based Medicare managed care plans. As a result, a statutory amendment would be required before gainsharing arrangements violative of sections 1128A(b)(1) and (2) could be permitted by the Secretary.

Possibly even more crucial to the viability of gainsharing arrangements in the future than the statutory prohibition was OIG's assertion that, even if it had regulatory authority to protect an individual gainsharing arrangement through a favorable advisory opinion, it would be precluded from doing so due to the high risk of abuse it believes gainsharing poses. Under the OIG Advisory Opinion Process, the Department only will protect those arrangements that "pose little or no risk of fraud or abuse to the Federal health care programs."<sup>3</sup> Gainsharing raises significant risk of abuse, according to the OIG, because hospitals could be pressured by competitors and physicians to "game" the arrangement to create phantom savings or income to increase payments to referring physicians.

Based on the broad scope of the Advisory Bulletin, it appears that hospitals should reconsider gainsharing arrangements involving *fee-for-service* treatment as soon as possible. The OIG has taken the position that in deciding to take enforcement action against the parties to a gainsharing arrangement, it will consider, in the absence of any evidence that the arrangement violated any other statutes or adversely affected patient care, whether a gainsharing arrangement was terminated expeditiously following release of its guidance.

### **III. Specialty Hospitals and Clinical Joint Ventures**

Within the same Advisory Bulletin, the OIG also stated, in a somewhat cursory but important manner, that it believes some clinical joint ventures between hospitals and physicians, including freestanding speciality hospitals and arrangements where high revenue-generating services are reorganized into a legally separate hospital, also may violate sections 1128A(b)(1). In addition, the OIG opined that these entities may violate the federal anti-kickback statute. In light of the OIG's comments, institutions of this type (including heart and maternity hospitals) have been seeking legal analysis on these issues.

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<sup>3</sup> Medicare and State Health Care Programs: Fraud and Abuse; Issuance of Advisory Opinions by the OIG, 63 Fed. Reg. 38311, 38312 (July 16, 1998).